

8-1-1975

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Marilyn Riley

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Recommended Citation

Marilyn Riley, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975).

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Law Note

THE AVOWED LESBIAN MOTHER AND HER RIGHT TO CHILD CUSTODY: A CONSTITUTIONAL CHALLENGE THAT CAN NO LONGER BE DENIED

INTRODUCTION

Until recently the existence of Lesbian mothers was almost unrecognized in American society, for most people believe that homosexuality is inconsistent with the ability or desire to procreate. Historically, Lesbian mothers themselves have contributed to this assumption by their hesitancy to announce openly their life-style preference. They have justifiably believed that to do so would not only deprive them automatically of child custody but would also jeopardize them socially and economically. Lately, however, inspired by new feelings of gay pride, some mothers, at the risk of great personal loss, are admitting their Lesbianism while at the same time asking for custody of the children born during their heterosexual marriages.

The custody determinations involving these Lesbian mothers raise constitutional issues which must be examined against our society's strongly anti-homosexual background.¹ Generally, problems

1. Although the child's welfare is always of paramount importance in custody proceedings, this Note's purpose is to consider the rights of Lesbian mothers and to establish that the awarding of custody to homophile parents does not denigrate the "best interests of the child" standard. For a discus-

the women face result from Western culture's ancient homophobia—a combination of fear, hatred, and ignorance—which has produced a heritage of persecution directed at homosexuals. Because anti-homophile attitudes are so deeply rooted and widely accepted, they of course influence legislative and judicial responses to the homophile's demands for equal rights. Therefore, before considering the relevant constitutional issues, this Note will discuss the history and development of Western homophobia.

HOMOPHOBIA: THE EVOLUTION OF THE SIN-CRIME-SICKNESS SYNDROME

We are coming. . . . [W]e are still coming on, and our name is legion—you dare not disown us! . . . We have asked for bread; will you give us a stone? . . . You, God, in Whom we, the outcast, believe; you, world, into which we are pitilessly born; you, . . . who have drained our cup to the dregs—we have asked for bread; will you give us a stone? . . . Give us . . . the right to our existence!

From *The Well of Loneliness* by Radclyffe Hall

The Religious Background

Although homophobia² is basic to Western culture, its existence has just recently been acknowledged. Even the word itself, generally used only by gay liberation activists, is new.³ For millenia both religious and secular institutions encouraged hostility to variant sexual behavior and thus created the justification of this pervasive homophobic legacy. Our society's phobic feelings toward homosexuality have been sustained by an almost universal belief that any deviance from total heterosexuality is either an abomination to God, a manifestation of mental illness, an expression of criminality, or all three. Despite contemporary protestations that the "new morality" grants everyone the right to love freely and guiltlessly, ancient, widespread fears and misapprehensions of homosexuality persist.⁴

sion of this standard, see Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 20 SYRACUSE L. REV. 55-86 (1969). See also J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

2. The suffix *-phobia* is appropriate, for it denotes an obsessive, irrational dread which has no basis in reality. See, e.g., 2 COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2156 (1971 ed.).

3. *Homophobia* does not appear in either the *Compact Edition of the Oxford English Dictionary* (1971 ed.), the *Webster Universal Dictionary* (1970 ed.), the *American Heritage Dictionary of the English Language* (1969 ed.), or the *Random House Dictionary of the English Language* (1966 ed.).

4. This misunderstanding is so fundamental that most people interpret the word incorrectly, believing its derivation is the Latin *homo*, meaning *human being* or *man*. Actually its etymology is the Greek combining form

Before the consciousness-raising experience of the gay liberation movement, which began with the Christopher Street Riot in June, 1969,⁵ most homophiles⁶ fought desperately to conceal their true sexual orientation. Now however, inspired by their nascent awareness of self-worth, gays are "coming out" with demands for equal rights. The complex problems confronting these people in their struggle for equality cannot be fully appreciated without an understanding of the history of Judeo-Christian homophobia; for as Dr. George Weinberg states:

[T]he phobia appears as antagonism directed toward a particular group of people. Inevitably, it leads to disdain of those people, and to mistreatment of them. This phobia in operation is a prejudice, which means that we can widen our understanding of it by considering the phobia from the point of view of its being a prejudice and uncovering its chief motives.⁷

for same. See, e.g., the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 630-31 (1969 ed.); A. KINSEY, *et al.*, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 446 (1953).

5. For descriptions of the Christopher Street Riot, during which homophiles responded with violence to harassment by New York City police, see, e.g., D. KLAICH, WOMAN PLUS WOMAN 219 (1974); D. TEAL, THE GAY MILITANTS 17-23 (1971). Lessard, *Gay Is Good For Us All*, in THE HOMOSEXUAL DIALECTIC 205, 205-07 (J. McCaffrey ed. 1972).

6. I use *homophile* in selected contexts to emphasize that gay people must be defined by their total humanity rather than solely by their sexual propensity. Homophilia is a personality disposition which leads an individual to turn to members of her/his own sex for emotional, and usually also for sexual, gratification. Homophiles are not those who occasionally indulge in homosexual activity (for example, experimenting children, curious adults, or prison inmates) under sufficient stimuli. On the contrary they are people whose responses are almost exclusively and probably uncontrollably directed toward their own sex.

7. G. WEINBERG, SOCIETY AND THE HEALTHY HOMOSEXUAL 8 (1972). Professor Roger L. Shinn has also eloquently described our homophobic heritage:

Contemporary discussion of homosexuality, at least in Western cultures, must move through a desert of accumulated debris before getting at its subject. The debris is constituted of ignorance, fear, and guilt. The ignorance is partly a lack of accurate information and partly a collection of misinformation propagated in popular culture. The fear is of a threat, real or imagined, to acknowledged values; it is sometimes strongest among people who fear a latent homosexuality in themselves and, in retaliation, lash out against homosexuality in others. The guilt is a long legacy of persecution inflicted upon a minority of society, far out of proportion to the penalties imposed upon people who deviate from customary manners and morals in other ways. Shinn, *Homosexuality: Christian Conviction & Inquiry*, in THE SAME SEX 43, 43 (R. Weltge ed. 1969) [THE SAME SEX is hereinafter cited as Weltge].

Although homosexual religious rites were important in pre-Greco-Roman civilizations from the eastern Mediterranean to Sumeria,⁸ ancient Hebrews seem to have had an anti-homophilic tradition. The origin of this tradition remains unknown, but it probably was an outgrowth of the Hebrews' desire to build and strengthen their young culture. Homosexual practices might have been condemned because they do not contribute to population growth—a prerequisite for any new society. Moreover, Jewish homophobia could have been a reaction to variant sexual habits which existed in the surrounding hostile civilizations. When the tradition was first articulated, the Jews were exiled in Canaan, where Atargatis, a goddess whose rites encouraged homosexual acts, was worshipped.⁹ Attempting to retain their distinctiveness as a culture, Jewish leaders promulgated laws that differentiated their followers from the Canaanites. A standard of conduct, which included homophobia, was established for the chosen people, distinguishing them from the pagans and intensifying their nationalistic zeal. Thus the consensus is “. . . that the Jews had a longstanding and strict prohibition against . . . homosexuality, which . . . came to be equated with ungodliness, heresy and moral subversion by neighboring enemies”¹⁰

Two unequivocal references to homosexuality are found in the Old Testament:

Thou shalt not lie with mankind, as with womankind: it is abomination.¹¹

If a man also lie with mankind, as he lieth with a women, both of them have committed an abomination: they shall surely be put to death; their blood *shall be* upon them.¹²

The meaning and impact of these passages cannot be denied. However, elsewhere in *Leviticus* the Lord also decrees death for “every one that curseth his father or his mother”¹³ or that “committeth adultery.”¹⁴ It is conceivable that many people who base their hatred of homophiles on God's laws as enunciated in *Leviticus* 18:22 and 20:13 have committed at least one of the “sins” proscribed by *Leviticus* 20:9 and 20:10. Moreover, there is nothing in the text to demonstrate that God finds homosexuality more serious than other

8. A. KARLEN, *SEXUALITY AND HOMOSEXUALITY* 6 (1971) [hereinafter cited as KARLEN].

9. *Id.* at 6.

10. *Id.* at 10. See H. HYDE, *THE LOVE THAT DARED NOT SPEAK ITS NAME* 29 (1970) A. KINSEY, *et al.*, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 481-83 (1953); D. WEST, *HOMOSEXUALITY* 22 (1967).

11. *Leviticus* 18:22.

12. *Leviticus* 20:13.

13. *Leviticus* 20:9.

14. *Leviticus* 20:10.

offenses he makes punishable by death in *Leviticus*' concatenation of "shalt nots." These ancient laws, created for a primitive, struggling society, are a tenuous justification for three thousand years of persecution visited on people who direct their emotional and physical love toward members of their own sex.

Genesis 19,¹⁵ which describes the destruction of Sodom and Gomorrah, is also almost universally accepted as a condemnation of homosexuality; however, some exegetic scholars now question this orthodox interpretation. For example after studying the Hebrew verb *yadha* (to know), Dr. Derrick Sherwin Bailey concludes that when the men of Sodom demand Lot's guests be brought out so "we may know them,"¹⁶ they could be expressing only a desire to meet the strangers.¹⁷ Additionally Dr. Bailey states that comparison of subsequent biblical references to Sodom indicates the city was destroyed to punish idolatry not sodomy. Thus paganism rather than homosexuality is the sin of Sodom.¹⁸

15. Although this passage is generally considered the Bible's first reference to homosexuality, G. Rattray Taylor suggests that Ham's sentence to perpetual slavery after seeing his father naked (*Genesis* 9:22-25) expresses Judaic homosexual anxieties. G. TAYLOR, *SEX IN HISTORY* 245 (1954). However, because the Old Testament abounds with proscriptions against nudity in the presence of relatives, both female and male (for example *Leviticus* 18:6-18), I do not find his suggestion convincing.

16. *Genesis* 19:5.

17. D. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 3-5 (1955) [hereinafter cited as BAILEY]. See also B. WYSOR, *THE LESBIAN MYTH* 25, 37 (1974).

18. BAILEY 10. See H. HYDE, *THE LOVE THAT DARED NOT SPEAK ITS NAME* 29-30 (1970). The most exact description of Sodom's sins is found in *Ezekiel* 16:49:

Behold, this was the iniquity of thy sister Sodom, pride, fulness of bread, and abundance of idleness was in her and in her daughters, neither did she strengthen the hand of the poor and needy.

The absence of any mention of sexual misconduct is remarkable. Dr. Bailey's argument is also sustained by *1 Kings* 15:11-12:

And Asa did that which was right in the eyes of the LORD, as did David his father.

And he took away the sodomites out of the land, and removed all the idols that his fathers had made.

Asa, ruler of Jerusalem, was the son of Abijam, grandson of Rehoboam, King of Judah, and great-grandson of Solomon. *1 Kings* chronicles the fame and power of Asa's forefathers, but it also relates that they incurred God's wrath by "walking in sin." Careful reading of their history discloses no indication that this sin was homosexuality. Actually the text makes clear that their offense was idolatry—the sin of Sodom and of the sodomites whom Asa expelled. See *1 Kings* 22:43-46.

It is interesting that the Old Testament authors do not discuss Lesbianism. *Deuteronomy* contains the only passage that might be construed even obliquely to refer to female homosexuality, and such a construction is at best attenuated. The verse reads: "The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so *are* abomination unto the LORD thy God."¹⁹ Taken in context with subsequent verses commanding that a person shall not sow a vineyard with diverse seeds,²⁰ plow with an ox and an ass together,²¹ or wear woolen and linen at the same time,²² the passage appears more a heavenly attempt to make a rigidly-ordered universe rather than a denouncement of homosexuality.

This Old Testament silence about Lesbianism possibly results from the anti-feminism so characteristic of early Hebrew culture. As in most strongly patriarchal societies, women's activities which did not directly affect men were deemed unimportant. So long as they willingly and successfully accomplished their designated tasks, women were ignored and isolated from the male community. What they did among themselves had little influence on the patriarchy and thus was not worthy of consideration.²³

Although Jesus himself never alluded to homosexuality, the influence of Jewish homophobia is manifested in the New Testament with the writings of Saint Paul.²⁴ As a vengeful rabbi, Paul persecuted Christians mercilessly until he experienced hallucination and hysterical blindness which converted him into a fanatical adherent of the faith he had hated. Paul did not know Jesus during their earthly lives and therefore was never exposed, as were the twelve original apostles, to the one loving presence that might have moderated his relentless, condemnatory nature. Not surprisingly this ascetic, self-righteous man is the only New Testament figure to damn homophiles.

Like the Old Testament writings, Paul's condemnations of homosexuality must be viewed in their historical context: they are statements from the zealous advocate of an ideological revolution whose mission was to convert hedonistic Greeks and Romans to a demanding new philosophy. In the early stages of any revolution, there

19. *Deuteronomy* 22:5.

20. *Deuteronomy* 22:9.

21. *Deuteronomy* 22:10.

22. *Deuteronomy* 22:11.

23. For a discussion of women's roles in early biblical times, see V. BULLOUGH, *THE SUBORDINATE SEX* 40-49 (1973); E. STANTON, *THE WOMAN'S BIBLE* (reprint ed. 1972).

24. See *Romans* 1:26-27; *1 Corinthians* 6:9; *Timothy* 1:10.

is a great need for cohesion—a uniting force separating “us” from “them.” Revolutionary leaders often create this force by establishing a group identity which emphasizes the differences between their followers and the unconverted population. Employing this tactic, Paul observed societies where he was preaching, discovered they accepted variant behavior abhorrent to his rabbinical background, and therefore condemned this behavior as unchristian. In effect he “. . . was saying what the Greeks and Romans do, we don’t do. They are pagans and we are Christians”²⁵

Professor Bullough believes this differentiation technique was typical not only of Saint Paul but also of many other early Christian disciples:

Since Christianity was competing with various other . . . cults for supremacy, it was influenced by what its rivals said or taught, either positively or negatively. Within any particular Christian community the attitudes toward sex . . . seemed, in fact, to be dependent upon the practices of its leading rivals²⁶

The Old Testament’s equivocal reference to variant behavior among women is paralleled in the New. While Paul’s remarks about effeminates and men who defile themselves with other men are clear in meaning, his one statement concerning “unnatural” female sexual habits is open to various interpretations: “For this cause [idolatry] God gave them up unto vile affections: for even their women did change the natural use into that which is against nature”²⁷ Although this passage may describe Lesbianism, it could also allude to the practice, common among Romans, of reversing the conventional male-superior coital position.²⁸ Thus men’s arrogance in regarding strictly female activities as unimportant might have allowed Lesbians to escape Saint Paul’s otherwise thoroughly sex-negative vigilance.

The most influential Christian philosopher after Paul is Saint Augustine, who was born in 354 and became a Christian at thirty-two, after spending his youth in an “abyss of vileness.”²⁹ Like Paul, whom he admired greatly, Augustine feared sensuality. In *The*

25. Father Herbert Rodgers, S.J., Professor of Systematic Theology, Fordham University, quoted in B. WYSOR, *THE LESBIAN MYTH* 43 (1974).

26. V. BULLOUGH, *THE SUBORDINATE SEX* 111 (1973).

27. *Romans* 1:26.

28. H. HYDE, *THE LOVE THAT DARED NOT SPEAK ITS NAME* 29 (1970).

29. 1 ST. AUGUSTINE, *THE CONFESSIONS* 20 (E. Pusey transl. 1909).

City of God, he sanctions sexual activity only between wife and husband and then only for procreation. Anything not leading to conception is done solely for pleasure and thus, according to Augustine, is sinful.³⁰ Under this sexual code, homosexuality is of course forbidden:

Therefore are those foul offences which be against nature, to be every where and at all times detested and punished: such as were those of the men of Sodom; which should all nations commit, they should all stand guilty of the same crime, by the law of God, which hath not so made men that they should so abuse one another. For even that intercourse which should be between God and us is violated, when that same nature, of which He is Author, is polluted by perversity of lust.³¹

Early ecclesiastical homophobia is also reflected in the codifications of Roman law accomplished by the early Christian emperors. Around 226 B.C., the *Lex Scantinia* had been promulgated, making male homosexual practices criminal.³² According to Westermarck, this law lay "... dormant for ages, and the subject ... never afterwards attracted the attention of the pagan legislators. But when Christianity became the religion of the Roman Empire, a veritable crusade was opened against it."³³ This crusade was probably begun in 390, when Valentinian II, Theodosius, and Arcadius enacted a statute which prescribed death by burning.³⁴ Justinian legislation of the sixth century sustained this penalty but also offered mercy to repentant sodomists who turned away from their "wicked" ways.³⁵

Judeo-Christian homophobia was further enforced by the appearance, sometime around 400, of Penitentials, which set forth exact punishments for various sexual sins. Included in these books are practices ranging from kissing to bestiality, with penances graded

30. St. Augustine's attitude toward sexual intercourse is articulated in Book 14 of *The City of God*:

What friend of wisdom and holy joys, who being married ... would not prefer, if this were possible, to beget children without this lust, so that in this function of begetting offspring the members created for this purpose should not be stimulated by the heat of lust ... ? For even shameless men call this shameful ... What! does not even conjugal intercourse, sanctioned as it is by law for the propagation of children, ... does it not seek retirement from every eye? ... And why so, if not because that which is by nature fitting and decent is so done as to be accompanied with a shame-begetting penalty of sin? 14 ST. AUGUSTINE, *THE CITY OF GOD* 262-64 (W. Oates ed. 1948).

31. 3 ST. AUGUSTINE, *THE CONFESSIONS* 39 (E. Pusey transl. 1909).

32. BAILEY 64.

33. E. WESTERMARCK, *CHRISTIANITY AND MORALS* 372 (1939) (footnote omitted).

34. *Id.* at 364-73.

35. BAILEY 80.

according to the seriousness of the crime. For example the penalty for sodomy, which runs from three years penance to thirty, is typically periods of fasting, vigil, exile, or exclusion from communion. Severity of punishment depends on the particular author and situation described.³⁶ The first extant Penitential to mention Lesbianism was written by Archbishop Theodore of Canterbury, who died in 690. It demands three years penance for female homosexuals, considerably less than that assigned male offenders.³⁷

Although the Penitentials are exact in their approach to punishment, they offer no rationale for their penalties. A rationale was not articulated until the thirteenth century when Thomas Aquinas wrote his *Summa Theologica*. Relying and expanding on Augustine, Saint Thomas accepted as moral those acts consonant with right reason; that is, those which accomplish their intended purposes in the correct manner. The intended purpose of venereal acts is procreation, and because procreation can occur only with heterosexual intercourse, such intercourse is the one acceptable sexual expression. As non-generative, homosexuality is inconsistent with God's design for humanity and therefore clearly offends both reason and nature. In expressing these ideas, Saint Thomas wrote:

[W]herever there occurs a special kind of deformity whereby the venereal act is rendered unbecoming, there is a determinate species of lust. This may occur in two ways: First, through being contrary to right reason, and this is common to all lustful vices; secondly, because, in addition, it is contrary to the natural order of the venereal act as becoming to the human race: and this is called the *unnatural vice*. This may happen . . . by copulation with an undue sex, male with male, or female with female

Now principles of reason are those things that are according to nature, because reason presupposes things as determined by nature, before disposing of other things according as it is fitting. . . . Therefore, since by the unnatural vices man transgresses that which has been determined by nature with regard to the use of venereal actions, it follows that in this matter this sin is gravest of all. . . . Vices against nature are also against God³⁸

36. For a discussion of the Penitentials, with accompanying text, see J. McNEILL & H. GAMER, *MEDIEVAL HANDBOOK OF PENANCE* (1938).

37. *Id.* at 185.

38. 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* question 154, arts. 11-12, pt. 11-11, at 1825-26 (Fathers of the English Dominican Province transl. 1947).

On this basis Aquinas concludes that homosexuals are concupiscent, unnatural, and sinful.

In *Sexuality and Homosexuality*, Arno Karlen provides an excellent summary of the development of Christian homophobia after Augustine and Aquinas.

The Church gave final definition and authority to these doctrines at the Council of Trent in 1563, in response to the challenge of the reformation. Questions on which there had been room for some conflict of opinion crystallized into dogma, so Augustine and Aquinas, became unshakable law for the faithful: sex even in marriage, shows a degree of moral abasement; the ideal state is freedom from impulse; the deepest and most dangerous impulse is sex.

This sort of basic attitude was not . . . anything new in the West; the Christian . . . view of sex was a variation on an old theme. The traditional Western hostility to homosexuality went on with little change in rationalization. Christianity simply showed greater vengefulness and punitive fervor, as it did generally in moral controls.³⁹

The Secular Background

In England homosexuality remained strictly an ecclesiastical offense until the sixteenth century. During the Middle Ages the usual punishments were exile, castration, flogging, or, most commonly, simple penance.⁴⁰ But if the homosexual offender had also been convicted on another and primary count, such as heresy, she/he was turned over to the magistrate for capital punishment, which only the civil courts could decree.⁴¹ Although Pollock and Maitland believe such relinquishment was uncommon, they do state that the ". . . crime against nature . . . was so closely connected with heresy that the vulgar had but one name for both."⁴² Secular treatment of homosexuality changed in 1533, when Henry VIII made sodomy a felony,⁴³ probably with the realization that the statute would reduce the power of the ecclesiastical courts and provide a convenient weapon against his enemies. Passage of this law enabled temporal

39. KARLEN 77.

40. COUNCIL ON RELIGION & THE HOMOSEXUAL, DAUGHTERS OF BILITIS, SOCIETY FOR INDIVIDUAL RIGHTS, & TAVERN GUILD OF SAN FRANCISCO, *THE CHALLENGE AND PROGRESS OF HOMOSEXUAL LAW REFORM* 10 (1968).

41. Bailey, *The Homosexual and Christian Morals*, in *THEY STAND APART* 36, 46 (J. Rees ed. 1955).

42. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 556 (2d ed. 1959).

43. 25 Hen. 8, c. 6 (1533). Pollock and Maitland state that the enactment of the statute

. . . affords an almost sufficient proof that the temporal courts had not punished [sodomy] and that no one had been put to death for it for a very long time past. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 556-57 (2d ed. 1959).

courts to inflict the death penalty for homosexual acts not connected with other crimes.

Although reference to Lesbians during this period is again almost non-existent, it is reasonable to assume that they were subject to the same penalties as were their male counterparts. Between 1484, when witchcraft was declared a capital crime, and the end of the seventeenth century, over nine million European women were burned for a variety of offenses. Many of these offenses, including sodomy with the Devil, were based on alleged sexual misconduct.⁴⁴ Moreover, according to Havelock Ellis, at that time Lesbians who used an artificial male organ could be convicted of sodomy.⁴⁵

The Act of 1533, which remained in force for almost three centuries, was followed in the American Colonies, where homosexuality was punishable by death.⁴⁶ In England the Offences Against the Person Act of 1861 abolished the death penalty for sodomy and reduced the punishment to imprisonment from ten years to life.⁴⁷ However, the Labouchiere Amendment of 1885,⁴⁸ under which Oscar Wilde was convicted, created an entirely new crime of gross indecency with males in public or private; penalty was set at imprisonment for up to two years. This was the state of English law until July 27, 1967, when the recommendations of the Committee on Homosexual Offences and Prostitution were enacted. Private homosexual conduct between consenting adults is no longer criminal; for in the words of the Committee:

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal and private nature of moral or immoral conduct is to emphasize the personal and private responsibility of the individual for [her] his own actions, and that is a responsibility which a mature agent can properly be expected to carry for [herself] himself without the threat of punishment from the law.⁴⁹

44. See A. DWORKIN, *WOMAN HATING* 118-50 (1974).

45. 2 H. ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX* 195 (3d ed. rev. 1922).

46. KARLEN 126, 128.

47. 24 & 25 Vict., c. 100, §§ 61-63 (1861).

48. 48 & 49 Vict., c. 69, § 11 (1885).

49. THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION § 61 (authorized American ed., Stein & Day 1963).

Unfortunately the United States has not followed this enlightened approach. Although homosexuality itself is nowhere a crime, most states still make criminal the practices by which homophiles manifest their physical love.⁵⁰ In many penal codes these practices

50. The following is a list of state penal code sections covering deviant sexual behavior and the penalties for such behavior:

ALA. CODE tit. 14, § 106 (1959) (two to ten years imprisonment);
ALASKA STAT. § 11.40.120 (1972) (one to ten years imprisonment);
ARIZ. REV. STAT. ANN. § 13-652 (1956) (one to five years imprisonment);
ARK. STAT. ANN. § 41-813 (1964) (one to twenty-one years imprisonment);
CAL. PENAL CODE § 286 (West 1970) (not less than one year imprisonment);
D.C. CODE ANN. § 22-3502 (1973) (not more than \$1000 fine or not more than ten years imprisonment);
FLA. STAT. ANN. § 800.01 (Supp. 1974-1975) (not more than \$10,000 fine or not more than fifteen years imprisonment);
GA. CODE ANN. § 26-2002 (1972) (one to twenty years imprisonment);
IDAHO CODE § 18-6605 (1948) (not less than five years imprisonment);
IND. ANN. STAT. § 10-4221 (Supp. 1973) (not less than \$100 nor more than \$1000 fine, to which may be added two to fourteen years imprisonment);
IOWA CODE ANN. §§ 705.1, 705.2 (1950) (not more than ten years imprisonment);
KY. REV. STAT. ANN. § 436.050 (1969) (two to five years imprisonment);
LA. REV. STAT. tit. 14, § 89 (1974) (not more than \$2000 fine or imprisonment with or without hard labor for not more than five years, or both);
ME. REV. STAT. ANN. tit. 17, § 1001 (1965) (one to ten years imprisonment);
MD. ANN. CODE art. 27, § 553 (1957) (one to ten years imprisonment);
MASS. GEN. LAWS ANN. ch. 272, § 35 (1970) (not less than \$100 nor more than \$1000 fine or imprisonment in the state prison for not more than five years or in jail or in the house of corrections for not more than two and one-half years);
MICH. COMP. LAWS ANN. § 750.158 (1968) (not more than fifteen years imprisonment in the state prison);
MINN. STAT. § 617.14 (1964) (imprisonment for not more than twenty years);
MISS. CODE ANN. § 2413 (1957) (not more than ten years imprisonment);
MO. REV. STAT. § 563.230 (1953) (not less than two years imprisonment);
MONT. REV. CODES ANN. § 94-5-505 (1974) (not more than ten years imprisonment);
NEB. REV. STAT. § 28-919 (1965) (not more than twenty years imprisonment);
NEV. REV. STAT. § 201.190 (1973) (one to six years imprisonment);
N.H. REV. STAT. ANN. § 579:9 (1955) (not more than \$1000 fine or not more than five years imprisonment, or both);
N.J. STAT. ANN. § 2A:143-1 (1969) (sodomy with an adult is a high misdemeanor, not more than \$5000 fine, or not more than twenty years imprisonment, or both);
N.M. STAT. ANN. §§ 40A-9-6, 40A-29-3 (1972) (not more than \$5000 fine or two to ten years imprisonment, or both);

are described as the "abominable and detestable crime against nature"—a description which is an enlightening reflection of theolog-

N.Y. PENAL LAW §§ 130.38, 70.15 (McKinney 1967) (consensual adult sodomy is a misdemeanor, not more than three months imprisonment);

N.C. GEN. STAT. § 14-177 (1969) (fine or not more than ten years imprisonment at the discretion of the court);

OKLA. STAT. ANN. tit. 21, § 886 (1951) (not more than ten years imprisonment);

PA. STAT. ANN. tit. 18 §§ 3124, 1101, 1104 (1973) (extra-marital sodomy is a misdemeanor, not more than \$5000 fine or not more than two years imprisonment);

R.I. GEN. LAWS ANN. § 11-10-1 (1969) (seven to twenty years imprisonment);

S.C. CODE ANN. § 16-412 (1962) (not less than \$500 fine or five years imprisonment, or both);

S.D. COMPILED LAWS ANN. § 22-22-21 (1967) (not more than five years imprisonment in the state penitentiary or not more than one year in the county jail or not more than \$500 fine, or both such fine and imprisonment);

TENN. CODE ANN. § 39-707 (1955) (five to fifteen years imprisonment);

TEX. PENAL CODE ANN. § 21.06 (1974) (not more than \$200 fine);

UTAH CODE ANN. § 76-53-22 (1953) (three to twenty years imprisonment);

Vt. STAT. ANN. tit. 13, § 2603 (1974) (fellatio only is a felony; one to five years imprisonment);

VA. CODE ANN. § 18.1-212 (1950) (one to three years imprisonment);

WASH. REV. CODE ANN. § 9.79.100 (1974) (not more than ten years imprisonment);

W. VA. CODE ANN. § 61-8-13 (1966) (one to ten years imprisonment);

WIS. STAT. ANN. § 944.17 (1958) (not more than \$500 fine or not more than five years imprisonment, or both);

WYO. STAT. ANN. § 6-98 (1957) (not more than ten years imprisonment).

Colorado, Connecticut, Delaware, Hawaii, Illinois, Kansas, North Dakota, Ohio, and Oregon do not proscribe private, consensual, adult sodomy or other "deviate" sexual practices. On May 12, 1975, California's Governor Edmund Brown signed a bill, which will become effective January 1, 1976, legalizing all private sexual activity between consenting adults. Although the bill affects many heterosexual acts, it has been popularly called "the homosexual bill of rights." The measure generated heavy opposition from church groups, and several opponents quoted the Bible to warn the legislature that passage would "increase promiscuity and contribute to the downfall of society." *San Diego Evening Tribune*, May 13, 1975, § 1, at 1, col. 3. Assemblyman Mike Antonovich also complained that the bill "condones a perversion, a sickness and says it is legal." *L.A. Times*, May 9, 1975, § 1, at 31, col. 5.

Cities with gay civil rights laws include East Lansing, Mich.; San Francisco, Cal.; Washington, D.C.; Ann Arbor, Mich.; Seattle, Wash.; Berkeley, Cal.; Detroit, Mich.; Columbus, Ohio; Boulder, Colo.; Minneapolis and St. Paul, Minn.; Ithaca, N.Y.; Palo Alto, Cal.; and Portland, Ore. This is the state of the law as of December 30, 1974. Letter to Marilyn Riley from The National Gay Task Force, New York City, N.Y., March 12, 1975.

ical definitions of homosexual acts.⁵¹ Even murder, rape, and incest are not subject to such expression of opprobrium.⁵² However a trend toward lesser penalties is evident in recent legislation, with some states moving toward the Model Penal Code recommendations. Under the Code "deviate sexual intercourse" is a felony only when nonconsensual or when committed with a minor. Public solicitation (loitering) is a petty misdemeanor.⁵³

51. See text accompanying notes 11, 12, 19, 27, 31, and 38 *supra*.

52. A typical discussion of this "crime" is found in *Honselman v. People*, 168 Ill. 172, 174-75, 48 N.E. 304, 305 (1897):

It was never the practice to describe the particular manner or the details of the commission of the act, but the offense was treated in the indictment as the abominable crime not fit to be named among Christians. (4 Blackstone's Com. 215). The existence of such an offense is a disgrace to human nature.

This statement is alluded to approvingly in *People v. Padfield*, 16 Ill. App. 3d 1011, 1013, 307 N.E.2d 183, 185 (1974). The adoption of the Model Penal Code recommendations and the passage of seventy-seven years have apparently made little difference in the Illinois judiciary's response to homosexuality.

53. MODEL PENAL CODE § 213.2 (Proposed Official Draft, 1962) reads:
Deviate Sexual Intercourse by Force or Imposition.

(1) *By Force or Its Equivalent.* A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the second degree if:

(a) he compels the other person to participate by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired the other person's power to appraise or control his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the other person is unconscious; or

(d) the other person is less than 10 years old.

Deviate sexual intercourse means sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

(2) *By Other Imposition.* A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the third degree if:

(a) he compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or

(b) he knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or

(c) he knows that the other person submits because he is unaware that a sexual act is being committed upon him.

MODEL PENAL CODE § 251.3 (Proposed Official Draft, 1962) reads:

Loitering to Solicit Deviate Sexual Relations.

A person is guilty of a petty misdemeanor if he loiters in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual relations.

MODEL PENAL CODE § 207.5, Comment, at 277-78, (Tent. Draft No. 4, 1955) reads in part:

The Scientific Background

The gradual movement toward recognition of Western homophobia has been encouraged by the scientific study of sexual variance. This study began in 1870, when Carl Westphal published the detailed history of a young Lesbian. Professor Westphal concluded that homosexuality is congenital and therefore cannot be termed a vice. On this basis he defended homophiles as neither criminal nor insane.⁵⁴

The next important published work on sexology is Richard von Krafft-Ebing's *Psychopathia Sexualis—A Medico-Forensic Study*. At first Krafft-Ebing accepted the then prevalent view that homosexuality is degenerate, the result of a hereditary weakness in the nervous system.⁵⁵ However at the time of his death in 1902, he had decided that variant behavior is not a disease but rather an anomaly compatible with psychic health. The final edition of his *Psychopathia Sexualis* contains an eloquent plea for decriminalization of consensual adult homosexual behavior; for Krafft-Ebing believed that:

Beyond a certain age, perhaps eighteen, when a sufficient degree of moral and intellectual maturity has been attained, the law has neither the right nor the duty to proscribe . . . acts which are committed with mutual consent.⁵⁶

One of the most compassionate scientific works on homophilia is Havelock Ellis' *Psychology of Sex*, which deals with both female and male homosexuality. Written in the 1920's, this book emphasizes Ellis' belief that ". . . a congenital predisposition as well as an acquired tendency is necessary to constitute true inversion"⁵⁷ and advances the idea that bisexuality is the basis of all sexual expression.

Ellis' theory of bisexuality was taken up by Freud, who thought that homophiles are basically bisexuals who experience some dis-

Our proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors, or public offense is based on the following grounds. No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities.

54. C. WESTPHAL, ARCHIV FÜR PSYCHIATRIE 73-108 (1869).

55. R. KRAFFT-EBING, PSYCHOPATHIA SEXUALIS 435 (12th ed. 1902).

56. *Id.* at 486. Translation by M. Riley.

57. 2 H. ELLIS, STUDIES IN THE PSYCHOLOGY OF SEX 83 (3d ed. rev. 1922).

turbance during the early stages of sexual development. Freud was not convinced that this disturbance results in a pathological condition or that variant behavior is degenerate. In *Contributions to the Theory of Sex*, he states:

That inverts are not degenerate . . . is based on several facts:

1. Inversion is found in people who otherwise manifest no marked deviation from normal.
2. On the contrary it is found in people whose mental capacities are not disturbed but who are rather distinguished by especially high intellectual development and ethical culture.⁵⁸

As will be discussed in further detail, the etiology of homophilia is disputed by contemporary scientists.⁵⁹ However the 1948 summary made by the Kinsey researchers remains an accurate representation of modern theory.

The data indicate that the factors leading to homosexual behavior are (1) the basic physiological capacity of every mammal to respond to any sufficient stimulus; (2) the accident which leads an individual into his or her first sexual experience with a person of the same sex; (3) the conditioning effects of such experience; and (4) the indirect but powerful conditioning which the opinions of other persons and the social codes may have on an individual's decision to accept or reject this type of sexual contact.⁶⁰

Although researchers continue to argue the causes of homophilia, they generally concur that variant behavior should not be penalized. In 1969 the National Institute of Mental Health urged that all private sexual acts between consenting adults be legalized.⁶¹

58. S. FREUD, *Drei Abhandlungen zur Sexualtheorie*, in 5 GESAMMELTE WERKE 26, 37 (3d ed. 1961). Translation by M. Riley. Thirty years after the *Comments* were written, Freud retained his belief in the non-pathological nature of homophilia. In a letter to an anonymous American mother, he wrote:

I gather from your letter that your son is a homosexual. I am most impressed by the fact that you do not mention this term yourself in your information about him. May I question you why you avoid it? Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function, produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them. (Plato, Michelangelo, Leonardo da Vinci, etc.) It is a great injustice to persecute homosexuality as a crime—and a cruelty, too. S. FREUD, BRIEFE 1873-1939, at 416 (E. Freud ed. 1960).

Freud was even more sanguine about female homophiles, for he believed that Lesbianism, while just as common as male homosexuality, is less "alarming." S. FREUD, *Über die Psychogenese eines Falles von weiblicher Homosexualität*, in 12 GESAMMELTE WERKE 260, 271 (reprint ed. 1955).

59. See text accompanying notes 390-392 *infra*.

60. A. KINSEY, *et al.*, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 447 (1953) (footnote omitted).

61. NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUAL-

And in December, 1973, the American Psychiatric Association adopted a resolution that "homosexuals be given all protections now guaranteed to all other citizens."⁶² Moreover, the Association voted to remove homosexuality from its official list of mental disorders.⁶³ Homophiles seem to be on the path of achieving their right to existence.

RESULTS IN SPECIFIC LESBIAN MOTHER CUSTODY CASES

The current trend among experts to accept homosexuality as variant rather than deviant behavior and to recommend decriminalizing all private, consensual, adult sexual activity is contradictory to most Western thought. Homophobia continues to be basic to the culture,⁶⁴ and as a result persecution of gays remains a deplorable feature of the society. This situation is exemplified by the fact that the existence of procreative homophiles is almost inconceivable to

ITY, FINAL REPORT AND BACKGROUND PAPERS 6 (1969) [hereinafter cited as NIMH REPORT].

62. American Psychiatric Association Resolution on Homosexuality, Press Release (December 15, 1973).

63. *Id.*

64. Anthropologist Geoffrey Gorer refers to "... the American panic fear of homosexuality. Among the generality of Americans homosexuality is regarded not with distaste, disgust, or abhorrence, but with panic; it is seen as an immediate and personal threat." G. GORER, *THE AMERICAN PEOPLE* 125 (1949).

See P. FISHER, *THE GAY MISTIQUE* 129 (1972):

Why does America cling so fiercely to her medieval antihomosexual legislation? For one thing, it must be remembered that the colonization of this country was accomplished in large part by religious dissidents whose Puritan morality made them unwelcome in their own homeland. The antisexual ethos is part of the American tradition, and one which has had an enormous influence on all of us, as has the American propensity for attempting to legislate private morality, from Prohibition to abortion.

In addition, the exaggerated narrowness of the masculine role in American society requires strong social and legal sanctions against homosexuality.

See SIECUS, *HOMOSEXUALITY* 5 (rev. ed. 1973): "The majority of human societies studied (49 of 79 other than our own) have condoned or even encouraged homosexual behavior. . . ."

See Moore, *Problematic Sexual Behavior*, in *THE INDIVIDUAL, SEX, AND SOCIETY* 343-44 (C. Broderick & J. Bernard eds. 1969):

There is probably no problematic sexual behavior more common and more widely misunderstood and feared than homosexuality. As far as we know, it has existed in every culture, and nowhere in the Western world is it as severely penalized as in the United States.

heterosexists, most of whom consider the phrase "Lesbian mother" a contradiction in terms.⁶⁵ Not surprisingly, therefore, courts presented with custody cases involving avowed Lesbian mothers have responded with varying degrees of intelligence and compassion. Some have decreed the women to be per se unfit. Others have declared that homosexuality is just one of the relevant factors to be considered. Still others have awarded custody to the mother with the stipulation that she neither live with nor visit her lover except under strictly delineated circumstances. Only a few have recognized that Lesbianism and Lesbian relationships have no bearing in themselves on the question of fitness.

The first definitive decision on the issue of a homophile's fitness to receive custody of her/his children is *Nadler v. Superior Court*,⁶⁶ in which a California court of appeals vacated an order finding that homosexuality as a matter of law renders a parent unfit. The appellate court directed that the awarding of custody be based on all relevant evidence rather than simply on the fact of the mother's gayness.⁶⁷ Nevertheless, at the rehearing the superior court judge again granted custody to the father. The mother was given visitation rights every Sunday with the condition that another adult be present at all times. In making this order, the judge stated:

I'm sincere in saying that I want this [four-year old girl] protected, and if the lady takes therapeutics and the psychiatrist can assure me, then I will look for unrestrained visitation. It would depend on the factors. Right now, I just can't take the chance.⁶⁸

The *Nadler* decision has not significantly aided California's Lesbian mothers, for it did not reach the issue of a woman's right to continue her homosexual relationships. Thus in *Mitchell v. Mitchell*,⁶⁹ custody was awarded the mother but with the stipulation that she neither live with her lover nor visit her at any time when the children, ages nine to fourteen, are not in school.⁷⁰

In another post-*Nadler* case, the Sonoma County Juvenile Court removed four children, ages seven to eleven, from the custody of a Lesbian mother and placed them in a foster home. The court of appeals sustained this action, concluding that "[t]he continuous existence of a homosexual relationship in the home where the minor

65. D. MARTIN & P. LYON, *LESBIAN/WOMAN* 132 (1972).

66. 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

67. *Id.* at 525, 63 Cal. Rptr. at 354.

68. *Nadler* rehearing, quoted in 2 WOMEN'S RIGHTS L. REP. 19, 21 (Spring, 1975).

69. No. 240665 (Super. Ct. for Santa Clara County, Cal., June 8, 1972).

70. *The Advocate*, July 19, 1972, at 6, col. 1.

is exposed to it involves the necessary likelihood of serious adjustment problems."⁷¹

A recent California case is *Chaffin v. Frye*,⁷² in which a Lesbian mother contested removal of her teenaged daughters from her custody. Although the probation officer conducting the court-ordered investigation found the mother fit, he recommended that custody be transferred to the maternal grandparents.

In response to the question, "So that one of the reasons why you recommend against the children remaining with Mrs. Chaffin is the very fact that she is an admitted lesbian; not that you have any evidence that indicates that the label itself denotes any immoral conduct?" The [sic] probation officer answered, "That is true." . . . He further testified that he did not have any evidence there was any behavior in the home that could be characterized as immoral or detrimental to the children⁷³

The trial court judge followed the probation officer's recommendation without specifically finding that it would be detrimental for the children to remain with their mother.⁷⁴ The court of appeals upheld the trial judge's order, making its own finding of detriment to Chaffin's daughters. Despite the children's statements that they wished to remain with their mother and that they never saw her engage in homosexual conduct, the court opined:

The fact that in certain respects enforcement of the criminal law against the private commission of homosexual acts may be inappropriate and may be approaching desuetude, if such is the case, does not argue that society accepts homosexuality as a pattern to which children should be exposed . . . or as an example that should be put before them for emulation.⁷⁵

On this basis custody of the girls was awarded the grandparents,

⁷¹ *In re Tammy F.*, No. 1 Civil 32648 (Cal. 1st App. Dist., Div. 2, Aug., 1973), *petition for hearing denied*, Cal. Sup. Ct. (Nov. 7, 1973), *quoted in* 2 WOMEN'S RIGHTS L. REP. 19, 23 (Spring, 1975).

⁷² 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975).

⁷³ Brief for Appellant at 20-21, *Chaffin v. Frye*, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975).

⁷⁴ *Id.* at xii. In relevant part, the California Civil Code reads:

Before the court makes any order awarding custody to a person or person other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. CAL. CIV. CODE § 4600 (West 1970).

⁷⁵ 45 Cal. App. 3d at 47, 119 Cal. Rptr. at 26.

who had themselves raised two probably homophile children.⁷⁰

The only true vindication of a Lesbian mother's rights are those decisions which do not restrict her relationship with her lover as a prerequisite of custody. The first such decision is *People v. Brown*,⁷⁷ in which the court found that although sufficient evidence existed that the mothers were engaged in a Lesbian relationship, "... there was little, if any, material and admissible evidence to support the finding that the appellants' homosexual relationship rendered their home unfit for their [eight] children [ages seven to seventeen]"⁷⁸ Similar results were reached in *Isaacson v. Isaacson*,⁷⁹ *Schuster v. Schuster*,⁸⁰ and *Hall v. Hall*⁸¹ (six-year-old boy).

The *Isaacson-Schuster* decisions are particularly significant, for the trial court had originally awarded custody to the mothers on the condition that they live apart. Because Ms. Isaacson and Ms. Schuster have been actively and publicly engaged in espousing the cause of Lesbian mothers, their ex-husbands accused them of flaunting their homosexuality and thus subjecting their six children to ridicule and to an immoral environment.⁸² Despite these accusations a Washington superior court held that the mothers could retain custody and were no longer bound by the earlier ruling that they would have to live separately.⁸³

In another Washington decision, a Lesbian mother was granted permanent custody of her three children without restriction on the relationship with her lover. The judge stated the order was based on his belief that a woman's sexual orientation is irrelevant to her fitness as a parent. A court-ordered investigation revealed that the children suffered no detriment in the Lesbian household and no peer harassment.⁸⁴

76. *Id.* at 47, 43, 119 Cal. Rptr. at 26, 23. -

77. 49 Mich. App. 358, 212 N.W.2d 55 (1973).

78. *Id.* at 365, 212 N.W.2d at 59.

79. No. D-36867 (Super. Ct. for King County, Wash., Sept. 3, 1974).

80. No. D-36868 (Super. Ct. for King County, Wash., Sept. 3, 1974).

81. No. 55900 (C.P. for Licking County, Ohio, June, 1974).

82. *The Advocate*, Jan. 17, 1973, at 10, cols. 1-5.

83. 2 WOMEN'S RIGHTS L. REP. 19, 25 (Spring, 1975).

84. *The Advocate*, July 13, 1974, at 20, col. 12.

After this Note was sent to the printer, the author was informed of a recent Lesbian mother case whose eventual outcome might be favorable. On February 21, 1975, Tryna Goldsmith lost custody of her eleven-year-old daughter in proceedings conducted in Hampshire County, Massachusetts. Memorandum and Injunctive Order at 2, *Goldsmith v. Jekanowski*, Civil No. 75-1308-F (D. Mass. April 28, 1975). The probate court judge ruled against Ms. Goldsmith and her daughter's non-biological mother, Linda Shear, in a deplorable and tragic courtroom scene. "Clinging alternately to Linda then to Tryna, Kyneret tried to stay with her mothers while

One of the most eloquent defenses of a Lesbian mother's right to child custody is the dissenting opinion of Justice Gunter in *Bennett v. Clemens*:⁸⁵

Where neglect, abuse, or mistreatment in some manner is absent, the state has no right to inquire into what a parent teaches [her] child, or with whom a parent allows [her] child to associate, or the type of environment a parent permits [her] child to inhabit. These are fundamental family rights, protected by the Common Law and our Bill of Rights, free from government intrusion. Freedom to think, teach, and express; freedom of association with other persons or classes of persons with varying degrees of morality and philosophy; freedom to inhabit a chosen cultural environment; and freedom to adopt a life-style that may not have the approval of the majority; all of these . . . freedoms exist even more emphatically within the family or the parent-child relationship.

Within this relationship the family or the parent adopts a moral standard for the members' conduct and associations, and the state cannot intrude upon or disrupt this relationship by asserting a different moral standard, conceived by judges, that must be adhered to.⁸⁶

The significance of the issues involved in Lesbian mother custody cases cannot be measured simply by counting the reported decisions. Because family courts have the option of sealing records to protect juveniles, some cases in which the mother's gayness has been a factor remain unreported.⁸⁷ Fearing that children will be disgraced by public revelation of a parent's homosexuality, judges have exercised

armed bailiffs seized her to drag her to her father." *Lavender Woman*, April 1975, at 1, cols. 2-3.

Kyneret accompanied her father to Illinois but returned to her mothers on February 25, stating:

If I am forced to leave Tryna and Linda and go with Harold [her father], I will run away again and I will keep running away until a Judge decides that I can live with Tryna and Linda or until a Judge realizes that I am old enough to make up my own mind.

Memorandum and Injunctive Order at 3.

Attorney Jeanne Baker has succeeded in winning a preliminary injunction from the United States District Court of Massachusetts, ordering that Kyneret be allowed to remain with her mothers. Letter from Ms. Jeanne Baker to Marilyn Riley, May 7, 1975. However Ms. Baker does not believe that chance for success on the merits is assured, for the federal district judge emphasized only the temporary irreparable harm Kyneret might suffer if separated at this time from Ms. Goldsmith and Ms. Shear. A final hearing will probably take place in June. *Id.*

85. 230 Ga. 317, 196 S.E.2d at 842, (1973).

86. *Id.* at 321-22, 196 S.E.2d at 844, (Gunter, J., dissenting).

87. M. Haft, *Custody and Visitation Rights of Gay Parents*, 1974 (unpublished ACLU sexual privacy project).

their option and thereby created a dearth of precedent in this area.⁸⁸ Furthermore, it is impossible to know how many women are still constrained to hide their Lesbianism for fear of losing their children and suffering general social opprobrium.

Nevertheless the number of Lesbian mothers in this country can be estimated. Dr. Gebhard believes that the accumulative incidence of female homosexuality is approximately ten to twelve percent among American women.⁸⁹ Psychiatrists Saghir and Robins report that seventy-nine percent of the homophile women they studied had had heterosexual intercourse and that twenty-six percent of this group had been married at one time.⁹⁰ Because of this high incidence of heterosexual activity among Lesbians, a substantial number are probably mothers. Moreover, as a result of cultural and psychological forces, women tend to discover their homophilia at a later age than do men. This slower awakening adds to the possibility that a woman will be married and have children when she realizes she is a Lesbian.⁹¹

A court's ruling on fitness will of course not only affect the Lesbian mother; it will also profoundly influence the children, their father, and any lover the woman might have. Additionally every homophile parent within the jurisdiction who is contemplating initiation of divorce and custody proceedings will undoubtedly base her/his determination to come out partly on the court's past decisions regarding fitness. Thus any one holding has the potential of drastically changing many lives in an extremely personal way.

However, more important than the number of people affected by a court's opinion is the quality of the rights involved. In Lesbian mother custody cases these rights are of constitutional magnitude; for they include questions of equal protection, due process, right to privacy, freedom of association, and establishment of religion.⁹²

88. *Id.*

89. Gebhard, *Incidence of Overt Homosexuality in the United States and Western Europe*, in NIMH REPORT, *supra* note 61, at 22, 28.

90. M. SAGHIR & E. ROBINS, *MALE AND FEMALE HOMOSEXUALITY: A COMPREHENSIVE INVESTIGATION* 246, 255 (1973) [hereinafter cited as SAGHIR & ROBINS].

91. G. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* 77-78 (1972).

92. Although most of the constitutional issues have not yet been reached by the courts, they have been raised by ACLU chapters in California, New Jersey, and Washington and by a number of private attorneys.

The remainder of this article relies extensively on sociological and psychological data. Lesbian mother custody cases are a new, unique, and complicated development in the judicial system; therefore, in order to arrive at the most just and socially beneficial resolution of the constitutional issues involved, we must consider the problem in the context of the contemporary cultural and scientific environment. In a number of recent decisions, the

THE FOURTEENTH AMENDMENT: DEPRIVATION OF EQUAL PROTECTION

An important step toward ending discrimination against homosexuals is establishing that distinctions based on homosexuality are suspect and that gays are thus entitled to special consideration under the equal protection clause of the fourteenth amendment.⁹³ Because custody determinations are primarily the province of the state, application of the fourteenth amendment in Lesbian mother custody cases poses no difficulty. This responsibility, like all other state action, must meet federal constitutional requirements.⁹⁴

Under its police power a state retains the right to classify its citizens for various purposes so long as the classifications are reasonably justified in pursuit of a legitimate interest.⁹⁵ Usually wide discretion is allowed in establishing classifications, and the courts give the state's judgment the "... benefit of every conceivable circumstance which might suffice to characterize the classification as

Supreme Court itself has adopted this approach. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Furman v. Georgia*, 408 U.S. 238 (1972); *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962); and *Brown v. Board of Educ.*, 347 U.S. 483 (1954). As Walter Barnett has written:

Even if the contours of constitutional doctrine should be relatively timeless, immune from the distortions that might result from being subjected to every wind of change in the behavioral sciences, still it is hardly possible, or even desirable, to immunize judges' minds from the influence of scientific knowledge. In the twenty-first century the American Constitution could not be read through the mind of a judge of the eighteenth century, or even of the nineteenth. Science colors our perception, whether we like it or not. Is it not then preferable to make sure that knowledge is fully available to judges, rather than partially and imperfectly? Without the full spectrum of such knowledge on a subject . . . the decisions of judges may reflect a factual perception that is only partly scientific and, in the other part, myth and superstition. W. BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* 136-37 (1973) [hereinafter cited as BARNETT].

93. A more detailed discussion of this issue is found in Chaitin & Lefcourt, *Is Gay Suspect?*, 8 LINCOLN L. REV. 24-54 (1973).

94. "It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463 (1958).

95. Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

reasonable rather than arbitrary and invidious.”⁹⁶ Thus the courts will not restrict the state’s police power even when that power interferes with individual rights if such interference is necessary to implement the common good and has a direct, substantial relation to the desired goal.⁹⁷ For example a state may impose certain voter qualifications,⁹⁸ age ceilings on eligibility for employment,⁹⁹ citizenship requirements for enjoyment of public property,¹⁰⁰ and restrictions on receipt of welfare benefits.¹⁰¹

In determining if state activity violates the equal protection clause, courts apply different standards of review. Traditionally, the more lenient is the “reasonable relationship” test used in most cases involving economic or commercial concerns or social welfare.¹⁰² Under this standard, classifications need only “. . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”¹⁰³ A newer, more stringent standard is the “strict scrutiny” test, applied when the classification is either inherently suspect or relates to a fundamental right or interest. Under this standard a classification is justified only if it is necessary to promote a compelling governmental interest.¹⁰⁴ When a state adopts a suspect classification, it “bear[s] a far heavier burden of justification,”¹⁰⁵ entailing a demonstration that its purpose is “. . . both constitutionally permissible and substantial, and that its use of the classification is ‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest.”¹⁰⁶

96. *Id.*

97. Compare *Johnson v. Robinson*, 415 U.S. 361, 378 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 638 n.20 (1969); *Railway Express Agency v. New York*, 336 U.S. 106 (1949), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942), with *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); compare *Graham v. Richardson*, 403 U.S. 365 (1971); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), with *Allied Stores v. Bowers*, 358 U.S. 522 (1959), and *Morey v. Doud*, 354 U.S. 457 (1957).

98. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

99. *Weiss v. Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971), *aff’d. mem.*, 461 F.2d 846 (2d Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973).

100. *Truax v. Raich*, 239 U.S. 33 (1915).

101. *Dandridge v. Williams*, 397 U.S. 471 (1970).

102. *Id.* at 485.

103. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

104. *Shapiro v. Thompson*, 394 U.S. 618 (1969). The one case in which a suspect classification has survived strict scrutiny is *Korematsu v. United States*, 323 U.S. 214 (1944) where national security was the compelling governmental interest. See also *Hirabayashi v. United States*, 320 U.S. 81 (1943).

105. *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

106. *In re Griffiths*, 413 U.S. 717, 722 (1973) (footnotes omitted).

To date the Supreme Court has designated the following classifications suspect:¹⁰⁷ alienage,¹⁰⁸ race,¹⁰⁹ religion,¹¹⁰ and nationality (ancestry).¹¹¹ Although the Supreme Court has not as yet had the opportunity to determine if homophilia is a suspect classification, a federal district court recently held that distinctions based on homosexuality must meet the strict scrutiny test.¹¹²

In *Frontiero v. Richardson*,¹¹³ the Supreme Court established a three-part standard for determining if a classification is suspect. The indicia are a "long and unfortunate history of . . . discrimination,"¹¹⁴ based on an immutable characteristic, frequently bearing no relationship to ability to perform or contribute in society.¹¹⁵ Homophiles clearly meet this standard.

The discrimination gays have historically suffered is discussed in section one above.¹¹⁶ Today in the United States homophiles may be denied employment,¹¹⁷ security clearances,¹¹⁸ marriage licenses,¹¹⁹ child custody,¹²⁰ the right to state sanctioned group organization,¹²¹ and even the right to enter the country.¹²² Also as stated

107. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), a plurality of the Supreme Court declared sex a suspect classification. Arguably poverty is also suspect. See *Griffin v. Illinois*, 351 U.S. 12 (1956).

108. *Graham v. Richardson*, 403 U.S. 365 (1971).

109. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

110. *Sherbert v. Verner*, 374 U.S. 398 (1963).

111. *Korematsu v. United States*, 323 U.S. 214 (1944).

112. *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974).

113. 411 U.S. 677 (1973). Since *Frontiero* was decided, the ACLU has applied its rationale establishing sex as suspect to argue that homophilia is also a suspect classification.

114. *Id.* at 684.

115. *Id.* at 686.

116. See text accompanying notes 1-63 *supra*.

117. *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 951 (1964).

118. *Gayer v. Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973); *McKeand v. Laird*, 490 F.2d 1262 (9th Cir. 1973).

119. *Baker v. Nelson*, 409 U.S. 810, *dismissing appeal from* 291 Minn. 310, 191 N.W.2d 185 (1972).

120. *In re Tammy F.*, No. 1 Civil 32648 (Cal. 1st App. Dist., Div. 2, Aug., 1973), *petition for hearing denied*, Cal. Sup. Ct. (Nov. 7, 1973); *Bennett v. Clemens*, 230 Ga. 317, 196 S.E.2d 842 (1973); *Hoffower v. Hoffower*, No. 376-144 (Cir. Ct. of Ore. for Multnomah County, 1972).

121. *State ex rel. Grant v. Brown*, 39 Ohio St. 2d 112, 313 N.E.2d 847 (1974).

122. The Immigration and Nationality Act, 8 U.S.C. § 1182 provides in

previously, only Colorado, Connecticut, Delaware, Hawaii, Illinois, Kansas, North Dakota, Ohio, and Oregon do not make homosexual expressions of physical love illegal.¹²³ Of course police harassment of homophiles is too well known to require elaboration.¹²⁴ This pattern of discrimination was emphasized during May, 1974, when voters in New York City, which perhaps has the largest, most vocal gay population of any American city, refused to grant homophiles full civil rights.¹²⁵ Representatives Bella Abzug (D-New York) and Edward Koch (D-New York) have attempted to partially rectify the situation by sponsoring a bill¹²⁶ which would add the words "sexual orientation, sex or marital status" to the list of anti-discrimination characteristics in the 1964 Civil Rights Act.¹²⁷

The second part of the *Frontiero* standard requires that the group characteristic inducing discrimination be immutable; that is, not susceptible to significant alteration. This criterion of suspectedness is the most difficult to meet, for science has not yet determined the precise etiology of psycho-sexual differentiation. Nevertheless, researchers agree a simple biological basis for homosexuality has not been found.

After reviewing all the reports, the only conclusion possible was that positive evidence of a physical nature that might serve *sine qua non* as an indicator of homosexuality was *absolutely non-existent*.¹²⁸

part that:

(a) . . . the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(4) Aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect . . .

In *Boutillier v. Immigration & Naturalization Service*, 363 F.2d 488 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967), the court of appeals held at 492-93 that ". . . the term 'psychopathic personality' as employed in . . . (a) (4) reflects a Congressional purpose to prevent alien homosexuals from obtaining admission into this country."

123. See note 50 *supra*.

124. For a description of Los Angeles police tactics, see *Project: The Consenting Adults Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643, 718-25 (1966).

125. N.Y. Times, May 24, 1974, § 4, at 5, col. 2.

126. H.R. 14752, 93d Cong., 2d Sess. (1974).

127. The Advocate, July 31, 1974, at 1, col. 1.

128. S. WILLIS, UNDERSTANDING AND COUNSELING THE MALE HOMOSEXUAL 13 (1967). See A. KINSEY, *et al.*, SEXUAL BEHAVIOR IN THE HUMAN MALE 660-61 (1948); PSYCHOANALYTIC RESEARCH & DEVELOPMENT FUND, SEXUAL DEVIATION (M. Ostow ed. 1974); Hampson, *Determinants of Psychosexual Orientation*, in SEX AND BEHAVIOR 108, 119 (F. Beach ed. 1965); Marmor, 1972 *Addendum*, in NIMH REPORT 78, 79; Money, *Sexual Dimorphism and Homosexual Gender Identity*, in NIMH REPORT 42-54; Money, *Factors in the Gene-*

Thus being a homophile, unlike being a Black or an American, is probably not conclusively determined at birth. Experts in the area tend to support instead a conditioning theory which, while acknowledging physical features that might be predisposing, emphasizes situational factors.¹²⁹ Therefore homosexuality cannot be considered an unalterable accident of birth. However, researchers generally conclude that once established, sexual orientation may be impossible to change, and in this way it is immutable.¹³⁰

The entire question of mutability may be rendered moot in light of the other classes the Supreme Court has deemed suspect.¹³¹ With varying degrees of effort, every characteristic but race and nationality (ancestry) can ultimately be changed. Moreover, as the Supreme Court itself recently stated:

When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.¹³²

So long as knowledge of homophilia remains incomplete, rational individuals must not be unduly inhibited in developing their own life styles. This is the only course a government dedicated to life, liberty, and the pursuit of happiness may honestly and justly choose.

The third part of the *Fronteiro* standard demands that the char-

sis of Homosexuality, in DETERMINANTS OF HUMAN SEXUAL BEHAVIOR 19-43 (G. Winokur ed. 1963).

129. See generally S. de BEAUVOIR, *THE SECOND SEX* 404 (Parshley transl. 1952); NIMH REPORT; Gebhard, *Situational Factors Affecting Human Sexual Behavior*, in SEX AND BEHAVIOR 483-95 (F. Beach ed. 1965); Pomeroy, *Homosexuality*, in Weltge, *supra* note 7, at 3, 12-13.

130. "As for psychotherapy, I know of not one single validated instance of any basic sexual change ever having been accomplished. Nor was the Kinsey Research ever able to find a single instance of any such change." C. TRIPP, *WHO IS A HOMOSEXUAL?* 11 (1965).

"We were struck by the fact that none of our medical witnesses were able, when we saw them, to provide any reference in medical literature to a complete change of this kind [a reorientation of sexual propensities]." THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION § 193 (authorized American ed., Stein & Day 1963).

See G. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* 142 (1972); Marmor, 1972 *Addendum*, in NIMH REPORT 78, 79.

131. See text accompanying notes 107-11 *supra*.

132. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

acteristic delineating the group suspect bear no relationship to a member's ability to function in society. Both courts¹³³ and recognized authorities¹³⁴ have stated that homosexuality does not impair an individual's potential as a productive member of the culture. In fact some writers have advanced the view that being a homophile actually encourages a striving for excellence. As Anthony Storr has written:

Many sexually deviant people are . . . intensely ambitious, and try to compensate for their inner sense of inferiority by achieving such power and success that they can compel respect and admiration even if they cannot command affection from their fellows.¹³⁵

The alleged homosexuality of such famous figures as Sappho, Socrates, Plato, Michelangelo, Shakespeare, Goethe, Walt Whitman, Emily Dickinson, Tchaikovsky, Gertrude Stein, and Virginia Woolf is usually cited in support of this argument, which seems to be espoused only by the most radical gay-liberation apologists. However, even less sanguine researchers agree that homophilia per se does not detrimentally affect participation in society. Curran and Parr, working with homophiles in England, discovered that " . . . both practicing and non-practicing homosexuals were on the whole successful and valuable members of society. . . . [They] found no reason to regard most of the patients as physically, intellectually, or emotionally immature."¹³⁶ Dr. Evelyn Hooker states that "[t]o this group belong many of our most useful and able citizens in all walks of life"¹³⁷ Hooker has conducted an especially significant study in which two groups—one heterosexual and one homosexual—were matched exactly according to age, intelligence,

133. See, e.g., *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Scott v. Macy*, 349 F.2d 182 (D.C. Cir. 1965); *Society for Individual Rights, Inc., v. Hampton*, No. C-73-0139AJZ (N.D. Cal., Oct. 31, 1973); *In re Labady*, 326 F. Supp. 924, (S.D.N.Y. 1971); *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969); *Nadler v. Superior Ct.*, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); *People v. Brown*, 49 Mich. App. 358, 212 N.W.2d 55 (1973); *Hall v. Hall*, No. 55900 (C.P. for Licking County, Ohio, June, 1974).

134. See, e.g., M. FREEDMAN, *HOMOSEXUALITY AND PSYCHOLOGICAL FUNCTIONING* 57-65 (1971); FREUD, *Drei Abhandlungen zur Sexualtheorie*, in 5 *GESAMMELTE WERKE* 37 (3d ed. 1961); W. PARKER, *HOMOSEXUALS AND EMPLOYMENT* 73 (1970); C. TRIPP, *WHO IS A HOMOSEXUAL?* 13 (1965); Saghir, *et al.*, *Psychiatric Disorders & Disability in the Female Homosexual*, in 127 *AM. J. PSYCHIAT.* 65, 72 (Aug. 1970); American Psychiatric Resolution on Homosexuality, Press Release (December 15, 1973).

135. A. STORR, *SEXUAL DEVIATION* 34 (1964).

136. H. JONES, *TOWARD A CHRISTIAN UNDERSTANDING OF THE HOMOSEXUAL* 50-51 (1966).

137. Hooker, *Homosexuality—Summary of Studies*, in *SEX WAYS—IN FACT AND FAITH* 166, 172 (E. Duvall & S. Duvall eds. 1961).

and education. The subjects were given a series of projective tests, and three psychologists were asked to determine, on the basis of the results only, which group was homosexual. The scores were so similar that the experts found their task impossible.¹³⁸

Armon, who has conducted a similar study of Lesbians, reports that "... psychologists who functioned as judges were unable in blind analysis to correctly identify . . . [responses] as homosexual or heterosexual with a degree of accuracy that would be considered statistically significant."¹³⁹

In *San Antonio School District v. Rodriguez*,¹⁴⁰ a 1973 decision, the Supreme Court had occasion to describe the traditional indicia of suspectedness. These are that the class is burdened with disabilities, subjected to a history of unequal treatment, or reduced to a position of political powerlessness to an extent that its members need special protection from the majority.¹⁴¹ Homophiles manifestly are a minority "for whom . . . heightened judicial solicitude is appropriate."¹⁴² Like other oppressed minorities, gays are objects of pejorative labelling, deprecatory humor, and general stereotyping. In addition there are only certain jobs wherein homosexuality is tolerated, and in those jobs it is sometimes even assumed or expected. As a result of majoritarian opprobrium, gays have formed their own distinct subculture which exists in bars, parks, and other established meeting places. However, they have also organized groups¹⁴³ to combat prejudice and discrimination. Thus they act and are treated as a "discrete and insular"¹⁴⁴ minority—a suspect classification subject to rigid scrutiny and in most instances irrelevant to any constitutionally acceptable state action.¹⁴⁵

Even if the Supreme Court were to decide that classifications based on sexual orientation are not inherently suspect, a standard

138. Hooker, *Male Homosexuals and Their "Worlds,"* in *SEXUAL INVERSION: THE MULTIPLE ROOTS OF HOMOSEXUALITY* 83-107 (J. Marmor ed. 1965).

139. Armon, *Some Personality Variables in Overt Female Homosexuality*, 24 *J. PROJECTIVE TECHNIQUES* 292-307 (1960).

140. 411 U.S. 1 (1973).

141. *Id.* at 28.

142. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

143. These groups include the Mattachine Society, One, Inc., Daughters of Bilitis, Society for Individual Rights, and the National Gay Task Force.

144. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

145. See *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

stricter than the reasonable relationship test should be applied in Lesbian mother custody decisions, for these decisions involve a substantial personal concern.¹⁴⁶ A parent's interest in the companionship, management, custody, and care of her/his children reaches the Supreme Court "... with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."¹⁴⁷ The Court has declared the rights to bear and raise one's children "essential,"¹⁴⁸ "an enduring American tradition,"¹⁴⁹ "far more precious . . . than property rights,"¹⁵⁰ and "basic civil rights."¹⁵¹

In *Stanley v. Illinois*,¹⁵² the Supreme Court, finding unconstitutional a statute designating unwed fathers per se unfit to have custody of their children, stated that the right involved "undeniably warrants deference and, absent a powerful countervailing interest, protection."¹⁵³ This language, which seems to move away from the traditionally rigid dichotomy between the strict scrutiny and reasonable relationship tests, evidences an attempt by the Court to create a new formula for reviewing discrimination allegedly violative of the equal protection clause.¹⁵⁴ Such a doctrine demands that an appropriate governmental interest be suitably furthered by the challenged differential treatment.¹⁵⁵

Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. . . .¹⁵⁶

In *Dunn v. Blumstein*,¹⁵⁷ Justice Marshall described the constitutional standard by which state action is to be measured under this emerging concept:

146. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

147. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

148. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

149. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

150. *May v. Anderson*, 345 U.S. 528, 533 (1953).

151. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

152. 405 U.S. 645 (1972).

153. *Id.* at 651.

154. For a discussion of this emerging test, see Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1-48 (1972).

155. See, e.g., *San Antonio School Dist., v. Rodriguez*, 411 U.S. 1 (1973); *Police Dep't v. Mosley*, 408 U.S. 92 (1972); *James v. Strange*, 407 U.S. 128 (1972); *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Reed v. Reed*, 404 U.S. 71 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970).

156. *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 172 (1972).

157. 405 U.S. 330 (1972).

To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.¹⁵⁸

In Lesbian mother custody cases the classification (homophilia) is suspect; the interest affected (child custody) is substantial, and the asserted governmental interest in the child's welfare is best advanced by disregarding the woman's homosexuality when determining her fitness as a parent.¹⁵⁹ Thus the exercise of a state's police power in custody proceedings can be justified if it does not unnecessarily interfere with the security of the substantial interest in child custody;¹⁶⁰ state intrusion into the parent-child relationship is legitimate only when it accomplishes its goal of separating children from unfit parents.¹⁶¹

When the power of the state is being invoked to resolve an issue as important as child custody, the courts must be especially sensitive to the intent of the equal protection clause. As described in congressional enactments dating from 1870, this intent is to secure "the full and equal benefit of all laws and proceedings for the security of persons and property"¹⁶² and to subject everyone "to like punishment, pains, penalties . . . and to no other."¹⁶³ In many Lesbian mother custody cases the requirements of the equal protection clause have not been met, for when homophile parents are found per se unfit, the state has not carried its burden of proving that its interest in a child's welfare could not have been furthered with more precision or by use of less drastic means.¹⁶⁴

THE FOURTEENTH AMENDMENT: DEPRIVATION OF DUE PROCESS

Any judicial determination that Lesbian mothers are per se unfit has the effect of ". . . relegating [an] entire class of females to inferior legal status without regard to the actual capabilities of

158. *Id.* at 335.

159. See pp. 857-64 *infra* for a discussion of the state's compelling interest.

160. *Stanley v. Illinois*, 405 U.S. 645, 651-53 (1972).

161. *Id.* at 652.

162. 42 U.S.C. § 1981 (1970) (originally enacted as Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144).

163. *Id.*

164. See *Kahn v. Shevin*, 416 U.S. 351, 360 (1974) (Brennan, J., dissenting).

its individual members.”¹⁶⁵ Such a determination operates arbitrarily and capriciously to deny deserving women child custody and therefore constitutes an invidious discrimination violative of not only the equal protection but also the due process clause of the fourteenth amendment. Whenever a court makes a “per se” finding of unfitness, it effectively creates an irrebuttable presumption, “incapable of being overcome by proof of the most positive character.”¹⁶⁶ This result in itself raises substantial constitutional questions, for the Supreme Court has traditionally disfavored irrebuttable presumptions as repugnant to due process.¹⁶⁷ They are offensive because they deny an individual “. . . the essential procedural right to challenge the purported factual basis of a determination adversely affecting [her] his liberty”¹⁶⁸

These “per se” decisions are unconstitutional because they conclusively presume the mother’s unfitness from the single fact of her sexual orientation. Under these decisions, a practicing Lesbian is forever precluded from having custody of her children, regardless of her moral character, her financial status, her children’s wishes, or even the wishes of their father.¹⁶⁹ That the courts make no distinction between the well-adjusted and the neurotic homophile is patently absurd; for there can be no pretense that either common knowledge, experience, or scientific investigation has given assurance that all Lesbians make unfit mothers.¹⁷⁰ The wholesale con-

165. *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973).

166. *Heiner v. Donnan*, 285 U.S. 312, 324 (1932).

167. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645-46 (1974); *Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *Leary v. United States*, 395 U.S. 6, 29-33 (1969); *Schlesinger v. Wisconsin*, 270 U.S. 230, 231 (1926).

168. *Hurley v. Van Lare*, 365 F. Supp. 186 (S.D.N.Y. 1973).

169. See *Chaffin v. Frye*, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975); *In re Tammy F.*, No. 1 Civil 32648 (Cal. 1st App. Dist., Div. 2, Aug., 1973), *petition for hearing denied*, Cal. Sup. Ct. (Nov. 7, 1973); *Bennett v. Clemens*, 230 Ga. 317, 196 S.E.2d 842 (1973).

170. “I personally know a number of lesbian mothers . . . who have been awarded custody of their children by the courts, and who have demonstrated that they were completely worthy of the trust given them by the court.” Letter to defendant from Evelyn Hooker, Ph.D., Clinical Professor, Department of Psychiatry, School of Medicine, University of California, Los Angeles, Cal., June 28, 1973, on file at ACLU, New York City.

“Parents may be of the highest caliber . . . in their relationship with their children quite independently of, and apart from their . . . homosexuality.” Letter to defendant from John Money, Professor of Medical Psychology and Associate Professor of Pediatrics, Department of Psychiatry and Behavioral Sciences and Department of Pediatrics, The Johns Hopkins University School of Medicine, Baltimore, Md., June 6, 1973, on file at ACLU, New York City.

“It is remarkable . . . to think that with homosexuality we even consider interfering in a parent-child relationship which elsewhere we consider inviolable.” Letter to defendant from George Weinberg, Ph.D., April 21, 1973,

demnation of Lesbians as a class, without the opportunity for any individual woman to demonstrate she does not possess the supposed characteristics which delineate the class, is clearly violative of due process.¹⁷¹ By forbidding a mother ever to controvert the presumption of unfitness, courts unjustifiably cause a substantial deprivation. They view women one-dimensionally (as Lesbians) when a finer perception could be accomplished by assessing separately each woman's fitness apart from her sexual orientation.

In addition a presumption shifts the burden of proving fitness to the Lesbian mother, and "it is plain that where the burden of proof lies may be decisive of the outcome."¹⁷² If the trial court conclusively assumes Lesbianism to be detrimental, the woman is faced with the task of justifying her life style in order to overcome an adverse decree entered by one judge.¹⁷³ Because of the great discretion placed in trial courts to decide custody matters, their decisions are difficult to reverse.⁽¹⁷⁴⁾ Lower court judges are thought to have expertise in these matters and are considered to be more aware of each family's situation.¹⁷⁵ Moreover, a family court is bound by prior

on file at ACLU, New York City.

"[A] person's sexual preference does not in itself determine her/his capacity for parenting, whether that preference be homosexual, heterosexual, or bisexual." Letter to Marilyn Riley from Betty L. Kalis, Ph.D., Clinical Professor, Department of Psychiatry, University of California Medical Center, San Francisco, Cal., Aug. 29, 1974.

The defendants referred to in the letters on file at the ACLU are defendants whose homophilia is a factor in custody proceedings.

171. See *United States Dep't of Agriculture v. Murry*, 413 U.S. 508, 514 (1973); *Skinner v. Oklahoma*, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring).

172. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

173. See *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965).

174. Generally absent statutory or constitutional provisions, an appellate court will not determine questions of fact concerning parental fitness, for such findings are the trial courts' province. See, e.g., *Porter v. Porter*, 237 So. 2d 507 (Ala. Ct. Civ. App. 1970); *Wood v. Wood*, 207 Cal. App. 2d 33, 24 Cal. Rptr. 260 (1962); *Lawrence v. Lawrence*, 165 Cal. App. 2d 789, 332 P.2d 305 (1958); *Brock v. Brock*, 228 Ga. 500, 186 S.E.2d 537 (1972); *Meredith v. Meredith*, 434 P.2d 116 (Idaho Sup. Ct. 1967); *Maroney v. Maroney*, 109 Ill. App. 2d 162, 249 N.E. 2d 871 (1969); *Krebs v. Krebs*, 255 Md. 264, 257 A.2d 428 (1969); *Heaver v. Bradley*, 244 Md. 233, 223 A.2d 568 (1966); *Graham v. Graham*, 428 S.W.2d 941 (Mo. Ct. App. 1968); *In re Huff's Custody*, 271 N.C. 709, 157 S.E.2d 360 (1967).

175. See S. KATZ, *WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY*

holdings only if a higher court has enunciated the standard by which decisions are to be made.¹⁷⁶ In light of all these factors, procedural due process becomes extremely important, for "[i]t is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."¹⁷⁷

A requisite of due process is that a person be afforded the opportunity to receive a meaningful hearing.¹⁷⁸ Depending on the nature of the interest involved, the hearing's formality and procedure may vary.¹⁷⁹

[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.¹⁸⁰

Following this admonition, several recent Supreme Court decisions have established that an individual may not be deprived of any significant private interest including child custody, without a hearing that strictly complies with the requisites of due process.¹⁸¹ Thus because a parent's interest in child custody is "substantial,"¹⁸² it can be abridged only if the state shows a powerful countervailing concern.¹⁸³ "Unless regulatory measures are . . . confined and are addressed to the specific areas of compelling . . . concern, the police power would become the great leveler of constitutional rights and liberties."¹⁸⁴

Of course a state's interest in protecting a child's welfare is com-

BREAKDOWN 59 (1971); M. Haft, *Custody and Visitation Rights of Gay Parents*, 1974 (unpublished ACLU sexual privacy project).

176. M. Haft, *Custody and Visitation Rights of Gay Parents*, 1974 (unpublished ACLU sexual privacy project). See text accompanying notes 66-76 *supra* for a discussion of the results following a California court of appeals decision that homosexuality does not render a parent *per se* unfit.

177. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

178. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

179. *Compare* *Goldberg v. Kelley*, 397 U.S. 254 (1970), with *In re Winship*, 397 U.S. 358 (1970).

180. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

181. Among these interests are the right not to bear children, *Roe v. Wade*, 410 U.S. 113 (1973); to have custody of one's children, *Stanley v. Illinois*, 405 U.S. 645 (1972); not to be dismissed from a non-tenured college teaching position, *Perry v. Sindermann*, 408 U.S. 593 (1972); to retain household goods, *Fuentes v. Shevin*, 407 U.S. 67 (1972); to have a driver's license, *Bell v. Burson*, 402 U.S. 535 (1971); and to receive welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970).

182. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

183. *Id.* at 651.

184. *Doe v. Bolton*, 410 U.S. 179, 216 (1973).

elling,¹⁸⁵ and its *parens patriae* power over custody determinations is complete except as limited by constitutional provisions.¹⁸⁶ Though made in the context of a delinquency case, the Supreme Court's declaration that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness"¹⁸⁷ is relevant to custody proceedings. Although some Lesbians are unsuitable parents, all are not in this category. Given the opportunity to make their case, many will be found to deserve custody. Thus when the due process standard of a meaningful hearing is met, the state's interest in children's welfare is furthered. Again the teaching of *Stanley v. Illinois*¹⁸⁸ could not be more explicit; while recognizing the state's legitimate concern in separating children from their neglectful parents, the Supreme Court observed that the state "... registers no gain towards its declared goals when it separates children from the custody of fit parents."¹⁸⁹ The Court then concluded that "... parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."¹⁹⁰

When a Lesbian mother is found per se unfit during custody proceedings, her hearing may have been meaningful in form but certainly not in substance.¹⁹¹ This finding is itself unconstitutional, for the due process clause forbids use of irrebuttable presumptions when they are not necessarily or universally true.¹⁹² In effect the Lesbian mother found per se unfit has been denied access to the only forum which can adjudicate her right to child custody—a de-

185. See, e.g., *Meek v. Pittenger*, 374 F. Supp. 639 (E.D. Pa. 1974); *In re S.M.*, 39 Cal. App. 3d 40, 113 Cal. Rptr. 847 (1974); *In re Levi*, 206 S.E.2d 82 (Ga. App. 1974); *Eggleston v. Landrum*, 210 Miss. 645, 50 So. 2d 364 (1951); *Beckman v. Beckman*, 358 Mo. 1029, 218 S.W.2d 566 (1949); *State ex rel. Juvenile Dep't Multnomah County v. Redmond*, 522 P.2d 503 (Ore. App. 1974); *Petition of Lutheran Children & Family Serv. of E. Pa.*, 450 Pa. 101, 312 A.2d 628 (1974).

186. See *Boddie v. Connecticut*, 401 U.S. 371, 385 (1971) (Douglas, J., concurring).

187. *Kent v. United States*, 383 U.S. 541, 555 (1966).

188. 405 U.S. 645 (1972).

189. *Id.* at 652.

190. *Id.* at 658.

191. See *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Willner v. Committee on character*, 373 U.S. 96, 106-07 (1963) (Goldberg, J., concurring); *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

192. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 643-48 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972).

nial which contravenes the due process requirement that the government act on an individual basis when important private interests are affected.¹⁹³

Manifestly, Lesbian mothers denied child custody based on irrebuttable presumptions of unfitness have suffered a "grievous loss."¹⁹⁴ The heart of the matter is that

[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against [her] him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.¹⁹⁵

The due process clause was designed also to protect citizens from an overbearing governmental concern for efficiency.¹⁹⁶ Although the creation of efficacious procedures to achieve legitimate state goals is a proper concern, "worthy of cognizance in constitutional adjudication,"¹⁹⁷ courts may not be allowed to disregard important private interests simply to further administrative convenience. Especially when an important interest is involved, administrative convenience is no watchword, "the mere recitation of which dictates constitutionality."¹⁹⁸ Thus states may not casually deprive an entire class of a meaningful hearing because some possible administrative benefit might exist. The magnitude of loss a Lesbian mother may suffer far outweighs the governmental interest in summary adjudication, for "the Constitution recognizes higher values than speed and efficiency."¹⁹⁹ The teaching of *Stanley v. Illinois*²⁰⁰ is controlling here.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here [presumptions of unfitness in child custody cases], the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly

193. *United States Dep't of Agriculture v. Murry*, 413 U.S. 508, 518 (1973) (Marshall, J., concurring); *Vlandis v. Kline*, 412 U.S. 441, 452 (1973).

194. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The complete quotation reads: "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."

195. *Id.* at 171-72 (footnote omitted).

196. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

197. *Id.*

198. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Carrington v. Rash*, 380 U.S. 89 (1965).

199. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (footnote omitted). See *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Carrington v. Rash*, 380 U.S. 89, 96 (1965); *Oyama v. California*, 332 U.S. 633 (1948).

200. 405 U.S. 645 (1972).

risks running roughshod over the important interests of both parent and child. It therefore cannot stand.²⁰¹

In many custody cases the judgment is based on an ill-defined concept of moral character.²⁰² As Justice Frankfurter, concurring in *Schwartz v. Board of Bar Examiners*,²⁰³ stated, arbitrary employment of such an imprecise standard contravenes the due process clause. Reflecting this belief are holdings by some courts that a woman's sexual conduct does not necessarily have a bearing on her fitness as a parent.²⁰⁴

Recent appellate cases dealing with parental morality reveal a discernible trend. Appellate judges appear increasingly unwilling

201. *Id.* at 656-57 (footnote omitted).

202. The fact is significant . . . that someone or some agency challenged parental rights on the basis of alleged parental immorality, and that a lower or trial court . . . punish[ed] the parents by removing their children from custody. . . . Indeed, agencies and trial courts may still be imposing their own prejudices and values on parents S. KATZ, WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN 69-70 (1971).

Finally, the courts do not grapple seriously with the question of whether the effect on the child of the parent's immorality is sufficiently serious to justify state intervention. In the final analysis neglect is a question of the normative pattern of society: yesterday's stern school master is today's child abuser, yesterday's parental hater of idleness is today's Fagin. To aggravate the problem, codified law in this area is often one or more generations out of step with the general beliefs of society, a condition which is reflected in the enforcement of penal laws directed against sexual immorality Sullivan, *Child Neglect: The Environmental Aspects*, 29 OHIO STATE L.J. 85, 109 (1968).

203. 353 U.S. 232, 248-49 (1957) (Frankfurter, J., concurring).

204. "[A]morality, immorality, sexual deviation and what we conventionally consider aberrant sexual practices do not *ipso facto* constitute unfitness for custody." *Feldman v. Feldman*, 358 N.Y.S.2d 507, 510 (Sup. Ct. App. Div. 1974). See also *In re Marriage of Russo*, 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1971); *In re Raya*, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (1967); *Bialic v. Bialic*, 240 Cal. App. 2d 940, 50 Cal. Rptr. 12 (1966). See also *King v. Smith*, 392 U.S. 309, 335-36 (1968) (Douglas, J., concurring); *Spence v. Durham*, 198 S.E.2d 537 (N.C. 1973). See pp. 815-20 for a discussion of results in specific Lesbian mother custody cases. See also *Christian v. Randall*, 516 P.2d 132 (Colo. Ct. App. 1973), in which the court held that the fact the former wife was undergoing a transsexual change from female to male and had married a woman did not justify removing custody to the father. The court found that the children's home environment was excellent and that they had not been adversely affected by their mother's conduct. See also UNIFORM MARRIAGE & DIVORCE ACT § 402: "The court shall not consider conduct of a proposed custodian that does not affect [her] his relationship to the child."

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... to impose their middle-class mores upon families and to punish
a parent's undesirable conduct²⁰⁵

This growing trend to excuse "undesirable" heterosexual conduct indicates that "per se" findings in Lesbian mother custody cases are probably based on the judge's homophobic attitudes.

The goal of custody proceedings, especially when a Lesbian mother is involved, must be to resolve the fitness issue dispassionately, with the court cognizant always of the constitutional issues and of Justice Holmes' admonition in his subsequently vindicated dissent in *Lochner v. New York*:

[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.²⁰⁶

The different standards courts employ when evaluating state action under the equal protection clause are discussed above.²⁰⁷ A similar approach is used when a due process issue is raised. In both instances the courts usually assign a value to the private interest and then require the state to show a more or less rational nexus between its action affecting that interest and its desired goal.²⁰⁸

205. S. KATZ, WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN 69 (1971). See *id.* at 57, 72.

206. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). See also the thoughtful opinion of Justice Mansfield in *In re Labady*, 326 F. Supp. 924, 930 (S.D.N.Y. 1971).

[Petitioner] has led a quiet, peaceful, law-abiding life Although he has engaged on occasion in purely private homosexual relations with consenting adults, he has not corrupted the morals of others . . . or engaged in any publicly offensive activities He is gainfully employed, highly regarded by his employer and associates, and he has submitted to therapy that was unsuccessful. Under all of the circumstances, *setting aside our personal moral views*, we cannot say that his conduct has violated public morality or indicated that he will be anything other than a law-abiding and useful citizen (footnote omitted; emphasis added).

As early as 1894, the Supreme Court of Washington recognized that majoritarian standards of morality must be carefully scrutinized before they are applied in custody cases:

There is such a diversity of religious and social opinion, and of social standing and of intellectual development and of moral responsibility, in society at large, that courts must exercise great charity and forbearance for the opinions, methods, and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or social standing, before a parent should be deprived of the comfort or custody of a child. *Love II v. House of the Good Shepherd*, 9 Wash. 419, 422, 37 P. 660, 662 (1894).

207. See text accompanying notes 102-106 and 146-61 *supra*.

208. See Van Alstyne, *The Demise of the Right-Privilege Distinction in*

A growing number of authorities have found no nexus between homosexuality and the ability to perform in society.²⁰⁹ Recently a federal district court in *Society for Individual Rights v. Hampton*²¹⁰ declared that even if the majority believes homosexuality is immoral, this is not reason enough to deprive a homophile of government employment without specification as to why such conduct relates to occupational competence or fitness. Similar results were reached in *Norton v. Macy*,²¹¹ *Scott v. Macy*,²¹² *McConnell v. Anderson*,²¹³ *Wentworth v. Laird*,²¹⁴ and *Morrison v. State Board of Education*.²¹⁵ As the court in *McConnell* stated:

[I]t seems clear that to justify dismissal from public employment, or . . . to reject an applicant for public employment, it must be shown that there is an observable and reasonable relation between efficiency in the job and homosexuality. . . . What [she] he does in [her] his private life as with other employees, should not be [her] his employer's concern unless it can be shown to affect in some degree [her] his efficiency in the performance of [her] his duties.²¹⁶

The Supreme Court also demands that a nexus exist between state-created standards of conduct and fitness: "A State can require high standards of qualification [B]ut any qualification must have a rational connection with . . . fitness or capacity" ²¹⁷

Constitutional Law, 81 HARV. L. REV. 1439, 1449 (1968). As articulated by Justice Frankfurter, the due process standard by which state activity is measured includes consideration of

[t]he precise nature of the interest that have been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and the good accomplished *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

See also *United States Dep't. of Agriculture v. Murry*, 413 U.S. 508, 519 (1973) (Marshall, J., concurring).

209. See text accompanying notes 136-39 *supra*; note 170 *supra*; pp. 857-64 *infra*.

210. No. C-73-0139AJZ (N.D. Cal., October 31, 1973).

211. 417 F.2d 1161 (D.C. Cir. 1969).

212. 349 F.2d 182 (D.C. Cir. 1965).

213. 316 F. Supp. 809 (D. Minn. 1970), *rev'd on other grounds*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

214. 348 F. Supp. 1153 (D.D.C. 1972) *aff'd*, 490 F.2d 740 (D.C. Cir. 1973).

215. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

216. 316 F. Supp. at 814.

217. *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957).

Given the Supreme Court's deference toward a parent's interest in child custody,²¹⁸ a requirement that the nexus between conduct and fitness in custody proceedings be firmly established is not unwarranted. Because a parent's concern in custody of her/his children is significant, any state action touching this concern is subject to a high level of scrutiny.²¹⁹ The only justification a state has in its abridgement is a showing of detriment to the children. That such detriment does not necessarily result from being raised in a Lesbian household is discussed below.²²⁰

CONTRAVENTION OF THE RIGHT TO PRIVACY

When a court investigates a woman's sexual life for the sole purpose of determining if she is a Lesbian, it flagrantly abuses her constitutionally protected right to privacy. Of course the state has the right to inquire into a parent's activities which might adversely affect a child. However absent allegations of misconduct potentially detrimental to the child, the court has no reason to question an individual's sexual orientation.²²¹

Although the Constitution does not explicitly guarantee a right to privacy, the Supreme Court has long recognized that such a right exists.²²² Its basis has been found in the first amendment,²²³ in the fourth and fifth amendments,²²⁴ in the penumbras of the Bill of Rights,²²⁵ in the ninth amendment,²²⁶ and in the concept of liberty guaranteed by the fourteenth amendment.²²⁷

218. See text accompanying notes 146-153 *supra*.

219. *Stanley v. Illinois*, 405 U.S. 645 (1972).

220. See pp. 857-64 for a discussion of the state's compelling interest.

221. See M. Haft, *Custody and Visitation Rights of Gay Parents*, 1974 (unpublished ACLU sexual privacy project); see the discussion of this trend in text accompanying notes 204 and 205 *supra* and note 185 *supra*.

See also Hurst, *Law and the Limits of Individuality*, in *SOCIAL CONTROL IN A FREE SOCIETY* 97, 128-29 (Spiller ed. 1960).

[The right to privacy] means that legitimate use of the state's power depends upon reasonable determination that its use will serve a public interest. The public force may properly be brought to bear upon the individual only for public purposes.

222. The Supreme Court's recognition of this right began with its decision in *Union Pacific R.R. v. Botsford*, 141 U.S. 250, 251 (1891), which was handed down one year after the appearance of Warren and Brandeis' definitive article, *The Right to Privacy*, 4 *HARV. L. REV.* 193-220 (1890).

223. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

224. *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967). See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

225. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

226. *Id.* at 486-87 (Goldberg, J., concurring).

227. *Id.* at 499-502 (Harlan, J., concurring). See also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Rosenberg v. Martin*, 478 F.2d 520, 524 (2d Cir. 1973), *cert. denied*, 414 U.S. 872 (1973).

Decisions have established that constitutional protection extends to all fundamental personal interests, "implicit in the concept of ordered liberty."²²⁸ Among these interests are marriage,²²⁹ family relationships,²³⁰ child rearing and education,²³¹ and freedom of association.²³² Consensual adult sexual activity is manifestly as important and fundamental as these rights. As Walter Barnett has written:

Among the personal liberties ranked as fundamental must be those necessary to satisfy basic needs that every human being experiences. The need for sexual fulfillment is such a basic human need. That fact is now so firmly buttressed by modern science as to be unquestionable; we may be rational animals, but we are animals nonetheless.²³³

In a recent decision a federal district court stated that constitutional protection has been extended to "... the most intimate phases of personal life having to do with sexual intercourse and its possible consequences."²³⁴ This protection specifically encompasses activities surrounding procreation,²³⁵ contraception,²³⁶ and termination of pregnancy.²³⁷ It has also been found to embrace non-marital sexual behavior,²³⁸ private homosexual conduct,²³⁹ including sodomy,²⁴⁰ private, consensual marital relations,²⁴¹ and nudism.²⁴²

That the constitutional guarantee of right to privacy in sexual

228. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

229. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

230. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

231. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

232. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 (1958).

233. BARNETT, *supra* note 92, at 97 (footnote omitted).

234. *Population Services Int'l v. Wilson*, 383 F. Supp. 543, 547 (S.D.N.Y. 1974). See also *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

235. *Skinner v. Oklahoma*, 316 U.S. 535, 541-43 (1942).

236. *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972).

237. *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

238. *Mindel v. United States Civil Serv. Comm.*, 312 F. Supp. 485 (N.D. Cal. 1970).

239. *In re Labady*, 326 F. Supp. 924, 930 (S.D.N.Y. 1971).

240. *Buchanan v. Batchelor*, 308 F. Supp. 729, 735 (N.D. Tex. 1970).

241. *Cotner v. Henry*, 394 F.2d 873, 875 (7th Cir. 1968), *cert. denied*, 393 U.S. 847 (1968).

242. *Bruns v. Pomerleau*, 319 F. Supp. 58 (D. Md. 1970).

matters is not limited to the marital relationship is a tenet which has been most forcefully enunciated by Justice Brennan: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion"²⁴³ Thus it is not the law's function to intervene into the private lives of citizens for the sole purpose of determining their sexual orientation, for ". . . official inquiry into a person's private sexual habits does violence to [her] his constitutionally protected zone of privacy."²⁴⁴ Review of lower court decisions reveals a trend which should eventually vindicate Justice Marshall's dissent in *California v. LaRue*.²⁴⁵ ". . . I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults."²⁴⁶

Of course the state does have a compelling interest in a child's welfare.²⁴⁷ Therefore if a nexus can be established between a mother's Lesbianism and detriment to her child, the state may abridge her constitutionally protected right to privacy.²⁴⁸ However, because such a nexus has never been found,²⁴⁹ a government assertion of a subordinating interest in transgressing a Lesbian mother's privacy is at best tenuous. When a "per se" finding is made, the state's interest is totally defeated, for the decision is inapposite to its accomplishment.²⁵⁰ Custody is denied on the basis of a single fact (homosexuality) which by itself has no bearing on parenting ability and which has become an issue only through the violation of the right to privacy.

In a number of recent cases, courts have balanced an alleged state interest in non-public sexual conduct against a person's right to privacy and, absent a compelling interest, have found no reason to abridge this right.²⁵¹ In *Scott v. Macy*,²⁵² the court of appeals held that the Civil Service Commission may not rely on allegations of homosexual conduct as grounds for disqualifying a person from

243. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

244. *In re Labady*, 326 F. Supp. 924, 927 (S.D.N.Y. 1971).

245. 409 U.S. 109 (1972).

246. *Id.* at 132 n.10 (Marshall, J., dissenting).

247. See note 185 *supra*.

248. See *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

249. See pp. 857-64 *infra* for a discussion of the state's compelling interest; note 170 *supra*.

250. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

251. Barnett argues that since the *Roe v. Wade* holding that a nonviable fetus is not a person protected under the Constitution, tangible harm to an individual is required to override the right to privacy. BARNETT 106.

252. 349 F.2d 182 (D.C. Cir. 1965).

government employment. The Commission had to justify its invasion of appellant's privacy by specifying why such conduct is related to competence. Again in *Norton v. Macy*,²⁵³ when the Civil Service Commission showed no connection between an employee's alleged private homosexual activity and his professional efficiency, its dismissal of appellant was arbitrary.

Termination of government employment as a postal clerk was also unconstitutional in *Mindel v. United States Civil Service Commission*,²⁵⁴ where inquiries into a man's non-marital sexual conduct were deemed violative of his right to privacy absent a rational connection between this conduct and his duties as a clerk.

In *Fisher v. Synder*,²⁵⁵ a federal district court found an unconstitutional impingement of the right to privacy occurred when a board of education terminated a teacher's contract solely because of her non-marital sexual activity when no proof existed that the "impropriety" marred her classroom performance. The conduct of teachers is of course a proper concern of their employers but only to the extent that it interferes with their teaching ability. When professional achievement is unaffected, private action may not be the basis of discipline.²⁵⁶

In California this protection has specifically been extended to homophile teachers.²⁵⁷ Justice Tobriner of the California Supreme Court aptly decried the absurdities of believing that public welfare is furthered by preventing an otherwise capable person from functioning in proper capacities simply because her/his private, personal behavior is different from the majority.

A particular sexual orientation might be dangerous in one profession and irrelevant to another. Necrophilism and necrosadism might be objectionable in a funeral director or embalmer, urolagnia in a laboratory technician, zoocerastism in a veterinarian or trainer of guide dogs, prolagnia in a fireman, undinism in a sailor, or dendrophilia in an arborist, yet none of these unusual tastes would seem to warrant disciplinary action against a geologist or short-hand reporter.²⁵⁸

253. 417 F.2d 1161 (D.C. Cir. 1969).

254. 312 F. Supp. 485 (N.D. Cal. 1970).

255. 346 F. Supp. 396 (D. Neb. 1972).

256. *Jarvella v. Willoughby-Eastlake City School Dist.*, 12 Ohio Misc. 288, 41 Ohio Op. 2d 423, 233 N.E.2d 143 (1967).

257. *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

258. *Id.* at 227-28 n.21, 461 P.2d at 385 n.21, 82 Cal. Rptr. at 185 n.21.

Even when employment entails obtaining a security clearance, the government may not always question an admitted homosexual about his sex life. A federal district court recently held that such procedure was a violation of the employee's right to privacy when the requisite nexus to determine if he was able to guard secret information was missing.²⁵⁹

Thus before the right to privacy may be invaded, the state must establish that otherwise a situation more adverse than the invasion itself would result.²⁶⁰ Absent this nexus, no inquiry may be made into an individual's personal life. Therefore unless the court can demonstrate a connection between a mother's sexual orientation and detriment to her children, questions concerning her Lesbianism are constitutionally inappropriate.

THE FIRST AMENDMENT: VIOLATION OF FREEDOM OF ASSOCIATION

Of course mothers have been awarded child custody even after unconstitutional invasions of their privacy revealed their homosexuality.²⁶¹ However, in some cases custody has been made dependent on these women radically changing life styles either by breaking up their Lesbian households or by seeing their lovers only under carefully prescribed circumstances.²⁶² When a court makes such changes a prerequisite of custody, it is infringing on both the right to privacy and the freedom of association as guaranteed by the first amendment and protected by the fourteenth.

In *N.A.A.C.P. v. Alabama*,²⁶³ the United States Supreme Court first established freedom of association as an independent constitutional right. The Court found this right "fundamental"²⁶⁴ and "in-

259. *Gayer v. Laird*, 332 F. Supp. 169 (D.D.C. 1971).

260. For employment cases discussing the nexus issue, see, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968); *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 246 (1957); *Konigsberg v. State Bar*, 353 U.S. 252, 262 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952); *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947). As to constitutional limitations on invasions of privacy under educational codes, see, e.g., *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

261. See pp. 815-20 *supra* for a discussion of results in specific Lesbian mother cases.

262. See pp. 815-20 *supra* for a discussion of results in specific Lesbian mother cases.

263. 357 U.S. 449 (1958). See also *De Jonge v. Oregon*, 299 U.S. 353 (1937).

264. 357 U.S. at 460.

dispensable"²⁶⁵ to liberty ". . . whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."²⁶⁶

In subsequent decisions the Court declared that free association is "closely allied to freedom of speech and . . . lies at the foundation of a free society"²⁶⁷ and that it is virtually an unconditional personal right, guaranteed to all by the Constitution.²⁶⁸ Moreover, constitutional protection of free association has been extended beyond the right to congregate publicly; it encompasses even discrete individual actions²⁶⁹ such as inviting a stranger into one's home not only for entertainment but also for forming a household.²⁷⁰

This formation of households is one of the rights Lesbian mothers are demanding, for Lesbians tend to have more enduring and affectionate relationships than do male homophiles.²⁷¹

The female reflects the impact of her socialization as a female. She is concerned with the establishment of a home. She relates sex to love and is more likely to abstain from sex until she meets "the right person." . . . [W]omen, including the lesbian, are trained to marital fidelity.²⁷²

That the type of household formed by Lesbians is radically different from the majority concept of the nuclear family is irrelevant. As the Supreme Court stated in *Wisconsin v. Yoder*:²⁷³

There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong". A way of life that is odd or even erratic but interferes with no rights . . . of others is not to be condemned because it is different.²⁷⁴

265. *Id.* at 461.

266. *Id.* at 460-61.

267. *Shelton v. Tucker*, 364 U.S. 479, 486 (1960).

268. *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring).

269. *United States Dep't. of Agriculture v. Moreno*, 413 U.S. 528, 542 (1973) (Douglas, J., concurring).

270. *Id.* at 538-45.

271. See SAGHIR & ROBINS, *supra* note 90, at 226; E. SCHUR, CRIMES WITHOUT VICTIMS 76-77 (1965); Oberholtzer, *Introduction—Subduing the Cyclops*, in *IS GAY GOOD?* 11, 48 (W. Oberholtzer ed. 1971).

272. Hedblom, *The Female Homosexual: Social and Attitudinal Dimensions*, in *THE HOMOSEXUAL DIALECTIC* 31, 34 (J. McCaffrey ed. 1972).

273. 406 U.S. 205 (1972).

274. *Id.* at 223-24.

Thus any court's attempt to control a Lesbian mother's relationships is potentially violative of her first amendment rights. "Whereas the freedom of association in *N.A.A.C.P. v. Alabama* was protected because it facilitated communication of a message, here the association itself is the protected communication."²⁷⁵ When Lesbian mothers form a household, they are in effect publicly advocating acceptance of an alternative life style, and this advocacy deserves constitutional protection.²⁷⁶

Because the Supreme Court has repeatedly stated that first amendment rights embrace not only verbal expression but also conduct,²⁷⁷ an analogy can be drawn between the types of speech and the types of activity protected by the Constitution. The first amendment guarantees the opportunity to persuade to action whether that action be unwise or immoral,²⁷⁸ and encompasses all issues about which information is required to enable people to understand the exigencies of modern life.²⁷⁹ Our system demands faith in the individual to decide for herself/himself when fully apprised of the merits of any controversy.²⁸⁰ Beyond doubt homophilia is one of contemporary society's most controversial issues. This fact and its first amendment ramifications were recently discussed by a federal district court:

In short, the record discloses that press, radio, and television commentators considered homosexuality in general . . . to be a matter of public interest about which reasonable people could differ, and [plaintiff] responded to their inquiries in a rational manner. . . . We hold, therefore, that [his] public statements were protected by the first amendment²⁸¹

275. Brief for Defendants at 24, *Schuster v. Schuster*, No. D-36868 (Super. Ct. for King County, Wash. 1974) & *Isaacson v. Isaacson*, No. D-36867 (Super. Ct. for King County, Wash. 1974).

276. See *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958).

277. See, e.g., *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966); *Hughes v. Superior Ct.*, 339 U.S. 460 (1950); *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949); *Bakery Drivers Local v. Wohl*, 315 U.S. 769 (1942).

278. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

"The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience." *Id.* at 457 (Douglas, J., concurring) (footnote omitted).

By limiting the power of the states to interfere with freedom of speech and freedom of association, the Fourteenth Amendment protects all persons, no matter what their views or means of expression. It is too late in the day to doubt that this freedom of association extends only to political or conventional associations and not to the social or the unorthodox. *Bruns v. Pomerleau*, 319 F. Supp. 58, 64-65 (D. Md. 1970).

279. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

280. *Eisenstadt v. Baird*, 405 U.S. 438, 457 (1972) (Douglas, J., concurring).

281. *Acanfora v. Board of Educ.*, 491 F.2d 498, 500-01 (4th Cir. 1974).

Above all the essence of the first amendment is that the government has no power to suppress or restrict expression because of its message, ideas, subject matter, or content.²⁸² Because constitutional guarantees are not confined to propagation of majoritarian beliefs, the government may not abridge the freedom to learn about unpopular ideas, "... fully to comprehend their scope and portent, and to weigh them against the tenets of the 'conventional wisdom'"²⁸³

Supreme Court decisions demonstrate that a compelling state interest is necessary to justify limiting first amendment freedoms,²⁸⁴ for "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."²⁸⁵ A number of recent holdings have established that if the state can prove a substantial nexus between the challenged association and a person's ability to perform in the situation at issue, the constitutional criterion has been met.²⁸⁶ However, experts have yet to show that being raised in a Lesbian household is detrimental to a child.²⁸⁷

282. See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92, 99 (1972); *Kingsley Int'l Pictures Corp. v. Regents of Univ. of State of New York*, 360 U.S. 684, 688 (1959).

283. *Eisenstadt v. Baird*, 405 U.S. 438, 457 (1972) (Douglas, J., concurring).

284. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968); *United States v. Robel*, 389 U.S. 258, 265 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960).

285. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

286. See *Watkins v. United States*, 354 U.S. 178, 198 (1957). See *Shelton v. Tucker*, 364 U.S. 479 (1960), where the Court stated that many associations, either social, professional, political, avocational, or religious have no possible bearing on a teacher's occupational competence. See also *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), in which the Supreme Court held there was no relationship between household composition and the right to participate in the food stamp program. See also *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), in which the Court declared that unorthodoxy in the field of political and social ideas does not negative good moral character and that discrimination based on membership in the Communist Party is invidious. See *Fisher v. Snyder*, 346 F. Supp. 396 (D. Neb. 1972), where no nexus was found between the fact that a woman lived in a non-marital relationship with a man and her fitness as a teacher. See *Bruns v. Pomerleau*, 319 F. Supp. 58 (D. Md. 1970), in which the court held there was no connection between belonging to a nudist camp and being able to work successfully as a policeman.

287. See pp. 857-64 *infra* for a discussion of the state's compelling interest; note 170 *supra*.

Moreover, when deprivations of first amendment rights are involved, irreparable harm is presumed.²⁸⁸ In custody cases the injury to the Lesbian mother is apparent. To demand that she choose between her natural life style and custody of her children is an indefensible violation of her constitutional rights.²⁸⁹ Additionally if the court's purpose in breaking up Lesbian relationships is to protect the children from exposure to homophilia, the demand appears even more questionable. Regardless of whether their mother manifests her Lesbianism or whether she endeavors to conceal her feelings, children are going to sense that she is "different." Decisions that attempt to destroy homosexual friendships therefore do nothing but foster dishonesty between parent and child. They do not deter homosexuality; they only make Lesbians miserable.²⁹⁰

It cannot be . . . *morally right* for society to inflict unhappiness and oppression on persons who are simply doing what comes naturally to them, particularly when the reversal of their nature is not realistic or desired.²⁹¹

Even the most loving, competent mother would find it difficult to function as a fit parent under such circumstances; the state would again be defeating its own compelling interest in a child's welfare.

When a court makes custody dependent on a woman's curtailing her homophilic associations, other Lesbian mothers who fear losing their children will be forced into isolated, suspicion-filled existences. This prior restraint based on fear of punishment is an unconstitutionally impermissible infringement of first amendment rights.²⁹²

It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . "Constitutional rights would be of little value if they could be . . . indirectly denied" . . .²⁹³

Moreover, discretion in the use of such conditions can easily become a weapon of oppression which a court can selectively employ.²⁹⁴

Because first amendment freedoms are "delicate and vulner-

288. *A Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969).

289. See text accompanying notes 261-288 *supra*. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), where the Supreme Court stated that government action cannot force a waiver of a constitutional right.

290. See D. MARTIN & P. LYON, *LESBIAN/WOMAN* 44-45 (1972).

291. B. WYSOR, *THE LESBIAN MYTH* 173 (1974).

292. "The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (footnote omitted).

293. *Harman v. Forssenius*, 380 U.S. 528, 540 (1965).

294. See pp. 815-20 *supra* for a discussion of the results in Lesbian mother custody cases.

able,"²⁹⁵ the state's power to abridge them must be carefully circumscribed, for:

If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.²⁹⁶

Thus the Supreme Court, recognizing that harm to indispensable liberties, such as speech and association, may inevitably follow from certain state activity,²⁹⁷ has affirmed the principle that ". . . regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."²⁹⁸

Just as in *N.A.A.C.P. v. Alabama*,²⁹⁹ where a statute compelling disclosure of membership was found to adversely affect first amendment rights, so here to sanction a denial of custody based on a Lesbian mother's associations would unconstitutionally impair her liberties. "[I]f the government could deny a benefit to a person because of [her] his constitutionally protected speech or associations, [her] his exercise of those freedoms would in effect be penalized and inhibited."³⁰⁰ The government would be permitted to produce indirectly a result it could not command directly.³⁰¹

Given the state's legitimate interest in a child's welfare, a court should demand the restructuring of a Lesbian mother's life only when, *all* factors considered, detriment to the child is found. Her loving relationship with another woman should not be the only issue upon which custody is determined, for the enjoyment of this important interest may not be conditioned upon the waiver of a constitutionally protected liberty. Freedom of association is beyond

295. *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

296. *Id.* at 438. See also *United States v. O'Brien*, 391 U.S. 367 (1968); *Bates v. Little Rock*, 361 U.S. 516 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

297. *N.A.A.C.P. v. Button*, 371 U.S. 415, 439 (1963); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958).

298. *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293, 297 (1961).

299. 357 U.S. 449 (1958).

300. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

301. See *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

"impairment through harassment, humiliation, or exposure by government."³⁰²

In *Procunier v. Martinez*,³⁰³ Justice Marshall eloquently expressed the essence of the first amendment. His words are particularly appropriate when an issue as controversial as homophilia is being considered.

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.³⁰⁴

In Lesbian mother custody cases rights of association and privacy are closely entwined. The freedom of people to join together to form a household is fundamental,³⁰⁵ and each individual is constitutionally guaranteed the liberty "... to satisfy [her] his intellectual and emotional needs in the privacy of [her] his own home."³⁰⁶ To dampen these rights the state must show a nexus between a mother's Lesbianism and her parental ability. Absent this nexus, the ransoming of a woman's children to the denunciation of her private associations is flagrantly unconstitutional.

THE FIRST AMENDMENT: VIOLATION OF THE ESTABLISHMENT CLAUSE

As discussed above,³⁰⁷ the sources of our culture's peculiar homophobia are obscure and complex; however, the Judeo-Christian tradition, on both the formal and popular levels, has exerted a great influence on the continuing persecution of gays.³⁰⁸ Therefore state

302. *Bates v. Little Rock*, 361 U.S. 516, 528 (1960) (Black & Douglas, J.J. concurring).

303. 416 U.S. 396 (1974).

304. *Id.* at 427 (footnote omitted) (Marshall, J., concurring).

See also *N.A.A.C.P. v. Button*, 371 U.S. 415, 444-45 (1963): "For the Constitution protects expression and association without regard . . . to the truth, popularity, or social utility of the ideas and beliefs which are offered." (emphasis added).

305. *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

306. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

307. See text accompanying notes 1-23 *supra*.

308. Coleman, *Changing the Law—The English Experience*, in *Is GAY Good?* 185, 186 (W. Oberholtzer ed. 1971); Shinn, *Homosexuality: Christian Conviction & Inquiry*, in Weltge, *supra* note 7, at 43, 44. See also BARNETT, *supra* note 92, at 245-46 n.68:

The more one surveys the literature, the more it becomes apparent that the medical profession, and particularly psychiatry, has not so much *found* norms in nature as it has *imposed* theological ideals on nature: God created them male and female; male and female created He them. The profession's task, like that of a priesthood,

activity which encourages this persecution is suspect as contravening the first amendment's proscription of all laws "respecting an establishment of religion."³⁰⁹ This proscription is absolute in its forbidding either preference to or antagonism toward any theory,³¹⁰ for the secular world may support no dogma and may recognize no heresy.³¹¹ Thus a state can neither discourage nor aid religious functions³¹² nor punish a person who entertains beliefs or disbeliefs.³¹³ Moreover, under the establishment clause all religions are denied protection from views and conduct they deem distasteful.³¹⁴ In this realm the individual conscience reigns absolutely. The only acceptable limitation is a compelling interest in the state to control actions harmful to others.³¹⁵

Because any union between government and religion tends to destroy government and to degrade religion,³¹⁶ "it is proper to take alarm at the first experiment on our liberties."³¹⁷ Therefore, the state must be neutral in all matters of religious theory, doctrine, and practice.³¹⁸ Any attempt by a state to place its power and prestige behind a religious belief produces a coercive pressure to conform that is constitutionally impermissible.³¹⁹

is to preserve inviolate this divinely ordained dichotomy between the sexes. Not only is a chasm fixed between the two, so that none may cross from one side to the other, but every blurring of the line must also be stamped out.

309. U.S. CONST. amend. I.

310. *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968); *Torcaso v. Watkins*, 367 U.S. 488, 492 (1961); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 210 (1948); *Everson v. Board of Educ.*, 330 U.S. 1, 5, 14, 15 (1947).

311. *Watson v. Jones*, 80 U.S. 679, 728 (13 Wall.) (1871).

312. *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

313. *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

314. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). See also *McGowan v. Maryland*, 366 U.S. 420, 563 (1961) (Douglas, J., dissenting).

315. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

316. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

317. J. MADISON, *Memorial and Remonstrance Against Religious Assessments*, 1785, in *THE COMPLETE MADISON: HIS BASIC WRITINGS* 299, 300-01 (S. Padover ed. 1953).

318. *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). The constitutional guarantee of religious freedom is applicable through the fourteenth amendment to both legislative and judicial action. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Engle v. Vitale*, 370 U.S. 421 (1962); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960).

319. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

In *Lemon v. Kurtzman*,³²⁰ the Supreme Court developed a three-part test for determining if state action violates the mandate of the establishment clause. To meet the *Lemon* standard the action's principal effect must neither advance nor inhibit religion; it must not foster excessive government entanglement with religion, and it must have a legitimate secular purpose.³²¹ The following discussion will consider the test's first and second parts together because it is precisely our society's desire to advance Judeo-Christian homophobia that precipitates government activity violating the establishment clause.³²²

The Greco-Roman world generally tolerated the homosexual until the fourth century, when Christianity became the dominant religion³²³ and set about distinguishing and prohibiting possible sources of pleasure.³²⁴ As part of this campaign against pleasure, the early church created a strictly explicit system of punishment against sexual deviation, which eventually became equated with heresy.³²⁵ This system was carried over into the temporal world, and resulting secular penalties have included imprisonment, ostracism, and death.³²⁶

The idea that laws against homosexual practices are divinely inspired is extremely tenacious. In his *Commentaries*, Blackstone discusses the crime "not fit to be mentioned among Christians":

This the voice of nature and of reason, and the express law of God, determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from Heaven: so that this is an universal, not merely a provincial precept. And our ancient law in some measure imitated this punishment by commanding such miscreants to be burnt to death³²⁷

320. 403 U.S. 602 (1971).

321. *Id.* at 612-13.

322. See pp. 800-15 *supra* for a discussion of homophobia—the evolution of the sin-crime-sickness syndrome.

323. Williams, *Walls of Ice—Theology and Social Policy*, in *Is Gay Good?* 163, 165 (W. Oberholtzer ed. 1971).

324. G. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* 9 (1972).

325. 2 F. POLLOCK & F. MATTLAND, *THE HISTORY OF ENGLISH LAW* 556 (2d ed. 1959).

326. See text accompanying notes 40-48 *supra*.

327. W. BLACKSTONE, *COMMENTARIES* * 216-17.

In general contemporary clergy assumes that secular homophobia is based on our Judeo-Christian heritage. Dr. Bailey writes:

[The theologian] finds . . . that the issue [of homosexuality] . . . is commonly prejudiced on the strength of certain theological assumptions which have influenced legislation and opinion in the past, but which can no longer pass unchallenged. Bailey, *The Homosexual and Christian Morals*, in *THEY STAND APART* 36, 37 (J. Rees ed. 1955).

Contemporary expression of traditional Judeo-Christian homophobia is found in officially tolerated harassment of homosexuals.³²⁸ "Far more than the educated and sophisticated reader supposes, repressive social policy on homosexuality is justified, on the popular level, in religious terms."³²⁹ For instance the Congressional Record reveals that when Congressman Dowdy of Texas was deploring gay civil rights organizations, he quoted Saint Paul as authority.³³⁰

Another example of the nexus between ecclesiastical and secular homophobia is the notorious pamphlet, *Homosexuality and Citizenship in Florida*,³³¹ a legislative committee report on proposed decriminalization of private, consensual homosexual acts. Recommending against reform, the committee concluded that ". . . the Biblical description of homosexuality as an 'abomination' has well stood the test of time."³³²

In *Lesbian/Woman*, Martin and Lyon recount that a San Francisco policeman told ministers protesting harassment of homosexuals that if they would not enforce God's laws, the police department would.³³³ And Harris in *The Puritan Jungle* describes a Florida vice-squad chief who justified his conviction that homosexuals would be better off dead by quoting *Leviticus* and *Corinthians*.³³⁴

The Immigration and Naturalization Service has also cited the Bible as authority to discriminate against gays. In 1971 the Service attempted to deny an alien citizenship because he had engaged in private homosexual relations. Relying on passages in *Genesis*, *Leviticus*, and *Romans*, the Service equated homosexuality with lack of good moral character.³³⁵

See generally BAILEY, *supra* note 17; IS GAY GOOD? (W. Oberholtzer ed. 1971); Weltge, *supra* note 7.

328. See generally Project: *The Consenting Adult Homosexual and the Law: an Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643-832 (1966).

329. Williams, *Walls of Ice—Theology and Social Policy*, in IS GAY GOOD? 163, 167 (W. Oberholtzer ed. 1971).

330. *Id.* at 167.

331. FLORIDA LEGISLATIVE INVESTIGATION COMM., *HOMOSEXUALITY & CITIZENSHIP IN FLORIDA* (Florida Legislature 1964).

332. *Id.*

333. D. MARTIN & P. LYON, *LESBIAN/WOMAN* 239-40 (1972).

334. S. HARRIS, *THE PURITAN JUNGLE* 165-67 (1969).

335. *In re Labady*, 326 F. Supp. 924, 930 (S.D.N.Y. 1971).

Of course the most obvious contemporary expression of traditional Judeo-Christian homophobia in the American legal system is that homosexual activity remains criminal in forty-one states.³³⁶ This equation of sin with crime is patently unconstitutional.

Where the law reflects notions of morality rooted in our particular history with values derived from biblical sources, and has no clear utilitarian basis, the case is particularly strong for an unconstitutional breach in the wall between church and state.³³⁷

Thus because anti-homosexual legislation is an attempt to eradicate behavior anathema to some Jews and Christians, it is violative of the first and second parts of the *Lemon* standard: it advances a particular religious dogma, and it fosters government entanglement with religion. So also do "per se" findings in Lesbian mother custody cases, for they cannot be justified on the basis that all homophile parents are unfit. Such decisions therefore give rise to the assumption that judges have "breached the wall" between church and state by accepting the belief that because it is "sinful," children must be shielded from homosexuality.³³⁸

When subjected to scrutiny, any contention that anti-homosexual legislation has reached the *Lemon* standard of a legitimate secular purpose fails. As discussed above,³³⁹ condemnation of homosexual conduct might have originated in the ancient Hebrews' need to expand their young culture through population growth. Because Jews felt a duty to increase and multiply, any interference with this goal was punished.³⁴⁰ At that time homophobia was under-

336. See note 50 *supra*.

337. Cantor, *The Need for Homosexual Law Reform*, in Weltge 83, 88. See BARNETT, *supra* note 92; Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 411 (1963).

338. See S. KATZ, *WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN* 59 (1971):

[Statutes] are designed to give a local judge, who is close to the family situation and knowledgeable about the community, discretion in interpretation and application. The effect is to make these standards subject to a judge's personal biases about sex, religion, and race

See also *id.* at 13: "The moral conduct expected of parents is rarely defined in terms of specific religious dogma . . . although the tenets of the dominant Judeo-Christian culture may influence the standards of parental conduct."

Justice Douglas' admonition in *Sherbert v. Verner* is especially relevant to Lesbian mother custody cases:

[M]any people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of "police" or "health" regulations reflecting the majority's views. 374 U.S. 398, 411 (1963) (Douglas, J., concurring).

339. See text accompanying notes 8 and 9 *supra*.

340. Bestiality (*Leviticus* 20:15), masturbation, and withdrawal in coitus (*Genesis* 38:9-10) were also proscribed.

standable as being necessary to the preservation of the state.

However this state interest no longer exists. In fact the danger of overpopulation is now alarmingly apparent. Success in procreation has evolved from the salvation to the nemesis of the species. "Spaceship Earth is . . . filled to capacity or beyond and is running out of food."³⁴¹ As a result of continued population growth, the world is faced with increased social unrest, political instability, and war.³⁴² Because nations are becoming interdependent, this growth affects everyone regardless of where it occurs.³⁴³ Thus a rational argument can no longer be made that the state has a subordinating interest in fostering procreation by outlawing sexual practices not leading to conception.

Resistance to legal reform comes also from those who believe homosexuals are by nature proselytizers and child molesters. These beliefs can, of course, exist apart from any religious basis and if true would justify state action. However, competent researchers have disproved both contentions, which are premised on the false assumption that homophilia is primarily a sexual activity. What people do not comprehend is that it encompasses the entire personality; homophilia "is the expression of a way of feeling, of loving, of responding to other people."³⁴⁴ Studies show that homosexual solicitation, when it does occur, is usually discreet, indirect, and made only if the other person appears responsive.³⁴⁵ The myth about child molestation has also been abandoned by experts. As psychiatrist Bieber says:

I find that homosexuals as a group are not sexually oriented toward children The idea that homosexuals are dangerous and that you have to keep them away and worry about them doesn't accord with my clinical experience.³⁴⁶

341. P. EHRLICH & A. EHRLICH, *POPULATION, RESOURCES, ENVIRONMENT* 3 (1970).

342. L. BROWN, *IN THE HUMAN INTEREST* 3 (1974).

343. Hauser, *Introduction: A Conceptual Overview*, in *THE POPULATION DILEMMA* 1, 3 (P. Hauser ed. 1969). See *ARE OUR DESCENDANTS DOOMED?* (H. Brown & E. Hutchings eds. 1972); R. COOK & J. LECHT, *PEOPLE!* (1968); D. FRASER, *THE PEOPLE PROBLEM* (1971).

344. D. MARTIN & P. LYON, *LESBIAN/WOMAN* 15 (1972).

345. See A. KINSEY *et al.*, *SEX OFFENDERS* 315, 347 (1965); E. SCHUR, *CRIMES WITHOUT VICTIMS* 111 (1965); *Project: The Consenting Adult Homosexual and the law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 647, 688-99 (1966).

346. This quotation appears in BARNETT 129-30 n.51. See P. WYDEN & B. WYDEN, *GROWING UP STRAIGHT* 43 (1968): "In fact, fewer homosexuals

The "sickness" theory also falls as a defense of secular homophobia, for most researchers now consider homosexuality a deviation rather than a perversion.³⁴⁷

Homosexuals are not *a priori* sick. Many of them present little or no psychopathology and those who do are rarely disabled by their disorder. . . . Thus, it is quite inappropriate and scientifically untenable to label an individual psychiatrically ill because [she] happens to be a homosexual, for to do so would only tend to perpetuate the social and legal discriminatory practices against men and women who are primarily different in their sexual preferences but who otherwise show little other differences from their fellow non-homosexual men and women.³⁴⁸

Even the purely religious justification of state action against homophiles is becoming questionable, for a trend has recently begun among some clergy to recognize and deplore the equation of crime with sin. Dr. Bailey suggests that theologians must test biblical assumptions about homosexuality to discover if they can still be accepted as determinative. He emphasizes that crime does not necessarily imply moral wrongdoing and that sin cannot always be punished by the state. For Dr. Bailey, legal proscription of homosexual conduct has become an anachronism.³⁴⁹

The English Quakers have taken this position even farther. Their famous statement on homophilia reads in part: "One should no more deplore 'homosexuality' than left-handedness Homosexual affection can be as selfless as heterosexual affection, and therefore we cannot see that it is in some way morally worse."³⁵⁰

American clergy are also questioning traditional Christian attitudes toward deviation. Dr. Roger Shinn has stated:

It is a misuse if Christians violate the integrity of other men and women by imposing upon them the understanding of sex that most Christians derive from Christ, the Christian tradition, and their own experience.³⁵¹

than heterosexuals are afflicted with this weakness" See E. SCHUR, *CRIMES WITHOUT VICTIMS* 111 (1965); SIECUS, *HOMOSEXUALITY* 10 (rev. ed. 1973); *THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION* § 57 (authorized American ed., Stein & Day 1963).

347. See text accompanying notes 54-63 *supra*.

348. SAGHIR & ROBINS, *supra* note 90, at 317. See Pomeroy, *Homosexuality*, in Weltge 3, 13:

To insist that [homosexuals] are abnormal, or sick, or neurotic just because they are homosexual is to engage in circular reasoning which smacks of a blind moralism founded in our Judeo-Christian heritage.

349. Bailey, *The Homosexual and Christian Morals*, in *THEY STAND APART* 36, 56-57 (J. Rees ed. 1955).

350. FRIENDS HOME SERV. COMM., *TOWARDS A QUAKER VIEW OF SEX* 26, 41 (rev. ed. 1964).

351. Shinn, *Homosexuality: Christian Conviction & Inquiry*, in Weltge 43, 51.

And the Reverend Ralph Weltge has written that:

God alone lives beyond sexuality. Love lives in history where sexual identification is ineradicable. And love fulfills that paradox by directing man sexually to his fellowman, woman. It also directs man to his fellowman, whether man or woman, in a style of life which is fully human because it participates in love which is the ultimate meaning of life. To be a man, fully human, is to be a man to woman and a man to man.³⁵²

Thus thoughtful Christians may accept all human sexual behavior as morally neutral so long as it is accompanied by love and concern.³⁵³

In 1965 The Council on Religion and the Homosexual issued A *Brief of Injustices* in which a group of ministers expressed their discouragement at the realization that many social problems faced by gays stem "from misconceptions about theology and the interpretation of the Bible."³⁵⁴ The *Brief*, recognizing the vast difference between the majority's sexual conduct and the standards legal codes define, rejects any law which gives public authority power over private, personal moral convictions.³⁵⁵

Of course not all organized religion is as compassionate. Therefore some homophiles, realizing that their sexual orientation does not preclude them from the need for spiritual guidance, have formed their own congregations. Branches of the Metropolitan Community Church are now serving gay people throughout the United States.³⁵⁶

Lay organizations have joined in urging that traditional Judeo-Christian homophobia no longer be state sanctioned. In 1966 the American Civil Liberties Union issued a policy statement on homosexuality that reads in part: "The judgment of such conduct, including its morality, is the province of conscience and religion, but is not a matter for invoking the penal statutes of the secular

352. Weltge, *The Paradox of Man & Woman*, in Weltge 55, 66. I believe it safe to assume that the Reverend Weltge directed his statement toward both female and male homosexuals.

353. Secor, *A Brief for a New Homosexual Ethic*, in Weltge 67, 78-79.

354. THE COUNCIL ON RELIGION & THE HOMOSEXUAL, A BRIEF OF INJUSTICES 10 (1965).

355. *Id.* at 11.

356. Interview with a deacon of the Metropolitan Community Church, San Diego, Cal., March 2, 1975.

state.”³⁵⁷ The American Law Institute has also adopted this approach as evidenced in the comments to the Model Penal Code:

The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to the religious, educational and other social influences. Apart from the question of constitutionality which might be raised against legislation avowedly commanding adherence to a particular religious or moral tenet, it must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions.³⁵⁸

Other organizations taking a similar stance include the National Institute of Mental Health,³⁵⁹ the American Psychiatric Association,³⁶⁰ SIECUS,³⁶¹ and the American Historical Association.³⁶²

Thus the trend to re-evaluate the connection between religious and secular homophobia is growing. As gays become more open about their life styles, they provide proof that prohibitive laws do not accomplish their goal of deterring homosexuality. Manifestly, government action cannot alter basic biological and psychological needs. Despite extensive official sanctions,

[h]omosexual practices have persisted . . . during most of recorded history, yet there is apparently nothing to show that they have contributed in any ascertainable measure to the decay of civilisations or the disintegration of society.³⁶³

Religiously inspired “crimes against nature” statutes and anti-homophile court decisions serve only to make criminals of otherwise law-abiding citizens, to foster disrespect for the legal system, and to open the way to blackmail.³⁶⁴ Moralists and law-makers are now realizing that biblical assumptions are not universally determinative and that Americans are guaranteed both freedom of and freedom

357. ACLU, *HOMOSEXUALITY* (Policy No. 246, 1966).

358. MODEL PENAL CODE § 207.1, Comment (Tent. Draft No. 4, 1955) (footnote omitted).

359. See text accompanying note 61 *supra*.

360. See text accompany notes 62 and 63 *supra*.

361. The SIECUS position is:

It is the right of all persons to enter into relationships with others regardless of their gender and to engage in such sexual behaviors as are satisfying and non-exploitive. Discrimination based on sexual orientation is a violation of this right. Letter to Marilyn Riley from Derek Burleson, Ed.D., Director of Educational and Research Services, SIECUS, New York City, Aug. 29, 1974.

362. The Advocate, Jan. 30, 1974, at 12, col. 1.

363. Bailey, *The Homosexual and Christian Morals*, in *THEY STAND APART*, 36, 59 (J. Rees ed. 1955).

364. See E. SCHUR, *CRIMES WITHOUT VICTIMS* 114 (1965).

from religion. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. [The Supreme Court] could not approve the slightest breach."³⁶⁵ Homophiles deserve the protection of this wall.

THE STATE'S COMPELLING INTEREST: WILL THE CHILD BE
MARTYRED TO THE LESBIAN MOTHER'S LIFE STYLE?

Because of its ancient foundation in the basics of the Judeo-Christian tradition, homophobia is an especially emotional issue. Added to the sin-crime-sickness syndrome is an almost universal latency fear: at least subconsciously most people realize that every human being has the propensity for homosexual behavior. We instinctively feel and usually abhor the fact that our sexual identity combines heterosexual and homosexual forces.³⁶⁶ Thus rejection of the homophile

. . . stems from fear, which breeds dislike. Images of repulsion towards homosexuals arise from both collective and personal fear. The collective fear is engendered by the interests of the state The personal fear of homosexuality generally results from religious conflicts and repressed homosexual feelings and desires. The dislike of the pervert is nothing but the unconscious fear of being perverted, and reflects self-hate.³⁶⁷

This combination of institutional and individual opprobrium makes homophiles especially vulnerable to discriminatory, repressive government action. Any infringement on their constitutional rights must therefore be subjected to close scrutiny. However the children involved in Lesbian mother custody cases also form a particularly vulnerable group.³⁶⁸ Their rights and welfare must be the deciding factor governing any custody award, for as the Supreme Court has warned:

Parents may be free to become martyrs themselves. But it does

365. *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

366. See BARNETT, *supra* note 92, at 203; C. FORD & F. BEACH, *PATTERNS OF SEXUAL BEHAVIOR* (1961); Moore, *Problematic Sexual Behavior*, in *THE INDIVIDUAL, SEX, AND SOCIETY* 343, 348 (C. Broderick & J. Bernard eds. 1969); letter to defendant from Dr. Benjamin Spock, June 19, 1973, on file at ACLU, New York City.

367. C. WOLFF, *LOVE BETWEEN WOMEN* 12 (1971).

368. See J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 7 (1973); Sullivan, *Child Neglect: The Environmental Aspects*, 29 OHIO STATE L.J. 85, 91-92 (1968).

not follow they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.³⁶⁹

The excuse most often offered for denying a Lesbian mother custody is, of course, that her life style will somehow be detrimental to her children.³⁷⁰ Therefore, it is important to consider what researchers have discovered about this life style. That homophile relationships can involve love and sustained commitment is an established fact.³⁷¹ Such relationships are especially common between Lesbians, who are influenced by the culturally determined female tendency to mix affection with sexual expression.³⁷² In addition because Lesbians do not offend the public conscience as much as do male homosexuals,³⁷³ they are freer to set up their own households. Moreover being a Lesbian does not usually adversely affect a woman's social life. Her friends are not limited to other homophiles, and her index of recognition as a Lesbian is low.³⁷⁴

369. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

370. The observations of Dr. George Weinberg are pertinent here: "Suppose a person, heterosexual or homosexual, blows up buildings, engages in looting, commits crimes of violence. The law seldom considers taking special pains to estrange such a person from [her] his children." Letter to defendant from George Weinberg, Ph.D., April 21, 1973, on file at ACLU, New York City. See letter to Marilyn Riley from Donna Martin, Ph.D., Chief Psychologist, Permanente Medical Group, Hayward, Cal., Aug. 10, 1974:

While there is no scientific evidence supporting the contention that being raised by a LM [Lesbian mother] or in a LH [Lesbian household] is detrimental to the child's welfare, we do have substantial data indicating that there is a high-probability of developmental damage to children raised by alcoholics, drug abusers, the criminally-involved, psychotics, retardates, etc. Yet the issue of child custody is not a major one in these already-identified high risk groups.

See letter to defendant from John Money, Professor of Medical Psychology and Associate Professor of Pediatrics, Department of Psychiatry and Behavioral Sciences and Department of Pediatrics, The Johns Hopkins University School of Medicine, Baltimore, Md., June 6, 1973, on file at ACLU, New York City:

In the worst cases of the battered-child syndrome I have encountered, the criminal neglect, assault and injury of the child has been perpetrated by a heterosexual mother and/or father. By contrast, some of the most tender devotion and care of sick and ailing children I have seen has been performed by a mother or father with an active homosexual history.

371. See D. MARTIN & P. LYON, *LESBIAN/WOMAN* (1972); B. WYSOR, *THE LESBIAN MYTH* (1974). See BARNETT 110.

372. SAGHIR & ROBINS, *supra* note 90, at 226; E. SCHUR, *CRIMES WITHOUT VICTIMS* 76-77 (1965); Hedbloom, *The Female Homosexual: Social and Attitudinal Dimensions*, in *THE HOMOSEXUAL DIALECTIC* 31, 34-35 (J. McCaffrey ed. 1972).

373. See pp. 800-15 *supra* for a discussion of homophobia: the evolution of the sin-crime-sickness syndrome.

374. BARNETT 147; SAGHIR & ROBINS 310.

This lighter social stigma leads to a relatively high degree of self-acceptance among Lesbians.³⁷⁵ In fact in comparison to their heterosexual female counterparts, many find themselves more independent, resilient, self-sufficient, composed, and self-confident.³⁷⁶ The results from personal adjustment, defensiveness, and self-evaluation tests are similar for homo-and heterosexual women.³⁷⁷ Additionally Kinsey found a definite correlation between increased educational level and incidence of female homosexuality.³⁷⁸

Data collected specifically on Lesbian mother life styles include the following facts:

Most Lesbian mothers were heterosexually married for at least several years.

Most Lesbian mothers have no preference as to the sexuality of their children but stress the importance of the children having options to choose what suits them best.

Most children of Lesbian mothers have men in their lives—the father, friends, relatives, or various teachers.

Most Lesbian mothers consider having children one of the most valuable and rewarding experiences of their lives.

Most Lesbian mothers were not aware they are attracted to women until after their marriages.

Most Lesbian mothers feel relating to other women has enriched their lives and will enrich their children's lives.³⁷⁹

On the subject of detriment to children, Dr. Donna Martin, Chief Psychologist for the Permanente Medical Group, writes:

In the course of my clinical work, I have had a fair amount of experience working with LMs [Lesbian mothers]. As I compare the LM group with heterosexual mothers I have seen, several differences emerge. My impression is that, as a group, the LMs

375. A. KINSEY, *et al.*, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 477 (1953); SACHER & ROBINS 285.

376. B. WYSOR, *THE LESBIAN MYTH* 158 (1974); Armon, *Some Personality Variables in Overt Female Homosexuals*, 24 *J. PROJECTIVE TECHNIQUES* 292-309 (1960); Thompson, McCandless & Strickland, *Personal Adjustment of Male and Female Homosexuals and Heterosexuals*, 78 *J. ABNORMAL PSYCHOLOGY* 237-40 (1971).

377. Thompson, McCandless & Strickland, *Personal Adjustment of Male and Female Homosexuals and Heterosexuals*, 78 *J. ABNORMAL PSYCHOLOGY* 237-40 (1971).

378. A. KINSEY, *et al.*, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 459 (1953).

379. These data were furnished by Ms. Barbara Bryant, School of Social Work, California State University, Sacramento, Cal., who is conducting a study of Lesbian mothers.

tended to be more thoughtful about the implications of their personal relationships for their children and more concerned about providing a healthy developmental environment. The focus of the LM group seemed to be heavily weighted on ways they might improve their mothering capabilities while the focus of the average HM [heterosexual mother] who comes to a psych [sic] clinic about her child has to do with how the mother is being affected by the child's unsatisfactory or disturbing behavior. In the first group, the stress seems to be on the child's welfare while, in the second, the concern tends to be more self-related. From what I have seen clinically, my impression is that children of LMs have as good a chance for developmental success as children from intact, heterosexual families. On the other hand, my observations lead me to believe that children of LMs have a higher probability of developmental success than do children of a single mother involved in transient or sequential heterosexual relationships.³⁸⁰

Dr. Judd Marmor, Professor of Psychiatry at the University of Southern California, Los Angeles, also believes that Lesbian mothers are capable of rearing well-adjusted children. He says ". . . without hesitation that a child brought up by a loving lesbian mother in a tranquil home is far better off than the thousands of children who are constantly growing up in 'straight' households marked by constant domestic turmoil and lack of affection."³⁸¹ These and other experts agree that the suitability of a parent to have custodial rights should be judged independently of that person's sexual orientation and that the exposure to a Lesbian life style in itself is not detrimental to a child. No evidence exists that homophile mothers have destructive effects on their children, for homosexuality renders no one incapable of love and intelligence—two qualities necessary to good parenting.³⁸² Sexual orientation indicates nothing about attributes of personality and character that influence ability to care for children.³⁸³

Another often expressed concern is that homophile parents are more apt to have homophile children. Among the experts who have denounced this theory are Dr. Wardell Pomeroy,³⁸⁴ Dr. Ralph Blair,³⁸⁵ Dr. Judd Marmor,³⁸⁶ Dr. Benjamin Spock,³⁸⁷ and Dr. Cap-

380. Letter to Marilyn Riley, Aug. 10, 1974.

381. Letter to Marilyn Riley from Judd Marmor, M.D., Professor of Psychiatry, School of Medicine, University of Southern California, Los Angeles, Cal., Aug. 2, 1974.

382. Letter to defendant from Ralph Blair, D.Ed., Director, The Homosexual Community Counseling Center, Inc., New York City, April 16, 1973, on file at ACLU, New York City.

383. Letter to defendant from Evelyn Hooker, Ph.D., Clinical Professor, Department of Psychiatry, School of Medicine, University of California, Los Angeles, Cal., June 28, 1973, on file at ACLU, New York City.

384. Letter to defendant, May 1, 1973, on file at ACLU, New York City.

385. Letter to Marilyn Riley, Aug. 6, 1974.

386. Letter to defendant, May 3, 1973, on file at ACLU, New York City.

387. Letter to defendant, June 19, 1973, on file at ACLU, New York City.

tane Thomson.³⁸⁸ Dr. Weinberg's thoughts are again instructive:

Most homosexuals have had parents who are exclusively heterosexual, or primarily so. As this fact suggests, homosexual men and women do not learn their sexual preferences by watching the sexual activities of their parents. . . . The occasional concern that a homosexual parent will rear homosexual children is unwarranted by the evidence.³⁸⁹

Indeed if homosexuality were primarily caused by the influence of gay parents on their children, homophilia could not be as prevalent as it is today.

Exploration of the etiology of homophilia is beyond this note's scope, for even scientists have not agreed on definitive causes. In truth it appears that

. . . no single cause-and-effect theory can satisfactorily explain what causes homosexuality. Nor has it even been established that some causal factors are more important than others. The literature is confusing on this subject, and recent research by investigators in several disciplines has not necessarily clarified matters³⁹⁰

However, some facts especially pertinent to this discussion must be noted. The majority of Lesbians studied grew up in homes with both parents present, but these parents expressed little affection for each other.³⁹¹ Moreover female homosexuals generally do *not* come from families in which there have been a significant number of other homophiles.³⁹² An equally important finding is that most males with problematic sexual behavior were raised in homes where the father *was* present.³⁹³

Those concerned with gender development in children have also

388. Letter to Marilyn Riley from Captane Thomson, M.D., Program Chief, Department of Public Health, Mental Health Services Division, County of Yolo, Cal., Aug. 7, 1974.

389. Letter to defendant from George Weinberg, Ph.D., April 21, 1973, on file at ACLU, New York City.

390. L. HATTERER, *CHANGING HOMOSEXUALITY IN THE MALE* 42 (1970). See *THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION* § 29 (authorized American ed., Stein & Day 1963).

391. D. ROSEN, *LESBIANISM: A STUDY IN FEMALE HOMOSEXUALITY* 29 (1974).

392. Wilbur, *Clinical Aspects of Female Homosexuality*, in *SEXUAL INVERSION* 268, 272 (J. Marmor ed. 1965).

393. R. GREEN, *SEXUAL IDENTITY CONFLICT IN CHILDREN AND ADULTS* 231 (1974).

suggested that Lesbian households will not be able to supply proper male identity figures. However, the

. . . likelihood of a total lack of opportunity to witness models of masculine roles is becoming increasingly remote. Male images are beamed into nearly every household through the "miracle of modern television," rendering isolation from a male *image* practically impossible.³⁹⁴

Additionally as Dr. Green testified in *Hall v. Hall*,³⁹⁵ children are always going to have female and male figures in their environment. Generally their own parents will take advantage of visitation rights, and the children will associate with the parents of their friends.³⁹⁶

Another unfortunate concern in Lesbian mother custody cases is the fear of child molestation. The myth surrounding homosexuals' propensity for children has been dispelled.³⁹⁷ In fact sexual molestation in our culture is essentially a heterosexual male act.³⁹⁸ Therefore given the data that most significant indices of child damage are male-related, ". . . the obvious conclusion is that there will be a lower probability of child abuse and child molestation in situations where the major caretaker is a woman, or women."³⁹⁹

The most realistic fear in granting custody to a Lesbian mother is that the children will be embarrassed by her homosexuality. It is true that they might possibly be subjected to ridicule as a consequence of public recognition of a parent's homophilia. However, similar problems are faced and overcome by children of inter-racial marriages and minority group children who live in non-minority neighborhoods.⁴⁰⁰ Moreover no child will be stigmatized by all her/his peers.⁴⁰¹ Even though some adversity will undoubtedly occur, it will not necessarily harm the child.⁴⁰² "It is time we all acknowledged that having the majority on one's side is the single most

394. *Id.* at 234.

395. No. 55900 (C.P. for Licking County, Ohio, June, 1974).

396. *Hall v. Hall*, No. 55900 (C.P. for Licking County, Ohio, June, 1974), record at 42-43.

397. See text accompanying notes 344-46 *supra*.

398. *Hall v. Hall*, No. 55900 (C.P. for Licking County, Ohio, June, 1974), record at 28, Dr. Richard Green testifying.

399. Letter to Marilyn Riley from Donna Martin, Ph.D., Chief Psychologist, Permanente Medical Group, Hayward, Cal., Aug. 10, 1974.

400. Letter to defendant from Judd Marmor, M.D., Professor of Psychiatry, School of Medicine, University of Southern California, Los Angeles, Cal., May 3, 1973, on file at ACLU, New York City.

401. *Hall v. Hall*, No. 55900 (C.P. for Licking County, Ohio, June, 1974), record at 33, Dr. Richard Green testifying.

402. *Id.* See also letter to defendant from George Weinberg, Ph.D., April 21, 1973, on file at ACLU, New York City.

overrated 'advantage' in most peoples' calculations."⁴⁰³

Regrettably when a case centers on a concept of "morality," a court often overlooks the basic question of the mother's parental ability. Mitigating circumstances such as the children's wishes, the mother's character, and the total home environment are apparently given little attention.⁴⁰⁴ Courts do not realize that maternal deprivation is a greater hazard than any possible influence on sexual orientation.⁴⁰⁵ As Anna Freud has written:

At some later date when knowledge about the psychic needs of the child is more widespread, we shall be . . . scared at the thought of the deficiencies in the child's psychic development whenever necessary elements like the mother relationship are insufficiently existent⁴⁰⁶

And according to the World Health Organization, research of maternal deprivation has established that:

Prolonged and severe deprivation beginning early in the first year of life and continuing for as long as three years usually leads to severely adverse effects on both intellectual and personality functioning that do resist reversal.

Prolonged and severe deprivation beginning in the second year of life leads to some grave effects on personality that do resist reversal, although the effects on general intelligence seem to be fairly completely reversible

. . . .

Subsequent experiences of insufficiency, distortion or discontinuity, in interpersonal interaction may be important in reinforcing impairments that otherwise might have been reversed more or less completely.⁴⁰⁷

Dr. John Money has capably summed up the approach that must

403. Letter to defendant from George Weinberg, Ph.D., April 21, 1973, on file at ACLU, New York City.

404. Sullivan, *Child Neglect: The Environmental Aspects*, 29 OHIO STATE L.J. 85, 108 (1968).

405. See letter to Marilyn Riley from Selma Kramer, M.D., Professor and Head of Section, Child Psychiatry, The Medical College of Pa., Philadelphia, Pa., Sept. 11, 1974; letter to Marilyn Riley from Captane Thomson, M.D., Program Chief, Department of Public Health, Mental Health Services Division, County of Yolo, Cal., Aug. 7, 1974.

406. 3 A. FREUD, *THE WRITINGS OF ANNA FREUD (1939-1945)* 129 (1973). See *id.* at 636-37. See also J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 51 (1973).

407. Ainsworth, *A Review of Findings and Controversy in the Context of Research Strategy*, in *DEPRIVATION OF MATERNAL CARE* 97, 153-54 (WHO Public Health Papers No. 14, 1962).

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be taken so that the interests of both the Lesbian mother and her children will be protected:

Society's apprehensions notwithstanding, it is not inevitably psychically dangerous for children, boys or girls, to live with a divorced parent who sets up a new household with a partner of the same sex. Children are rather readily able to equate such a situation with that of living with a widowed mother and her sister, or a father and grandfather, for example. It is not the sameness or difference of the sex of the adults that counts, but the quality of the relationship between them, and the quality of the relationship they establish with the child.⁴⁰⁸

So long as courts consider the quality of the entire relationship, they do not need to fear that the children will become martyrs to their parents' life styles.⁴⁰⁹

CONCLUSION

As a result of the new feelings of self-worth and sense of pride among gay people, avowed Lesbian mothers in increasing numbers will be demanding their right to child custody. Unprejudiced adjudication of this right can occur only if courts recognize and attempt to eradicate their basic homophobia. Because the fundamental Judeo-Christian fear of homosexuality pervades our society, this realization process will be long and arduous. Therefore, until the stigma of the sin-crime-sickness syndrome can be destroyed through rationality and enlightenment, homophiles must receive the highest standards of constitutional protection.

MARILYN RILEY

408. Letter to defendant from John Money, Professor of Medical Psychology and Associate Professor of Pediatrics, Department of Psychiatry and Behavioral Sciences and Department of Pediatrics, The Johns Hopkins University School of Medicine, Baltimore, Md., June 6, 1973, on file at ACLU, New York City.

409. After this Note went to the printer, the custody order in the *Chaffin* case (see text accompanying notes 72-76 *supra*) was modified under a ruling by the Superior Court of Torrance, California. The court based its decision to allow Ms. Chaffin's daughters to remain with her on the testimony of three psychologists that detriment would result if the children were taken away from their mother. San Diego Evening Tribune, July 14, 1975, § 1, at 13, cols. 1-2.